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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

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JEROME K. SUPPLE, DANIEL S. OUELLETTE, DANIEL N. MATHESON, III, THOMAS R. KOWALSKI, JANE C. MONDAY, WILLIAM L. CUNNINGHAM, W. C. PERRY, NORMAN D. ELDER, CLYDE C. WADDELL, JR., BECKY R. ESPINO, and TOM BURDENSKI,

Petitioners

vs.

HAYS COUNTY GUARDIAN, JEFFREY STEFANOFF, VICKI HARTIN, WEBB BRANEN, JOE GADDY, JODY DODD, JOE PTAK, ROBERT MARTINEZ, and JOHN DEMAREE,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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105 pp

QUESTIONS PRESENTED

1. Whether a state university's "anti-solicitation" rule, which restricts the distribution of any newspaper containing commercial advertising to "racks" at designated points on campus, to subscription through the mail, and to distribution by sponsored student organizations from tables continuously manned by students in a designated free speech area, violates freedom of speech under the First Amendment.

2. Whether all of a state university's outdoor premises constitute a designated public forum for students so that the university is constitutionally barred from restricting student distribution of materials containing commercial advertisement at any outdoor location on its campus.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Texas, on behalf of the petitioners herein, officials of the Texas State University System and Southwest Texas State University, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, reproduced at Appendix A, a1-a24, is reported at 969 F.2d 111. The final

judgment, amended final judgment, and findings of fact and conclusions of law, reproduced at App. B, a25, App. C, a26, and App. D, a27-52, are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

U. S. CONSTITUTION, AMENDMENT 1

"Congress shall make no law... abridging the freedom of speech...."

UNIVERSITY POLICIES AND REGULATIONS

The pertinent provisions of the rules of the Board of Regents of the Texas State University System and the "Operating Letters" ("OL") of Southwest Texas State University are reproduced verbatim at Appendices E, F, G, H and I.

STATEMENT OF THE CASE

Southwest Texas State University ("the university") is a coeducational institution of higher education located in San Marcos, Texas, and governed by the Texas State University Board of Regents ("the regents" or "the Board of Regents"), a state agency established by Texas law. Approximately 5,000 of the university's 22,000 students live on campus. The *Hays County Guardian* is an independent newspaper cooperatively owned and published by plaintiffs/respondents

Steffanoff, Hartin, Branen, Gaddy, Martinez and Demaree[1]. The paper, featuring articles on "environmental, peace and social justice issues," is distributed free and depends in part on commercial advertising to cover the costs of publication.

Prior to October 10, 1989, the plaintiffs distributed the *Guardian* at a variety of locations throughout the university campus, including academic departments, the student center, sidewalks, and walkways. However, on August 31, 1989, the university amended its "anti-solicitation" regulation to apply to newspapers distributed at no charge. The policies of the Board of Regents allow "free speech activities on the grounds of the campus" of each university within the system, subject however to each university president's authority to "adopt reasonable non-discriminatory regulations as to time, place, and manner of such activities." 969 F.2d at 117, App. A at a7. The university's implementing regulation, Operating Letter ("OL") 9.06 allows students and student organizations to "publicly distribute outdoors," on university grounds, any "pieces of literature that are not obscene, vulgar, or libelous, *or that do not contain impermissible solicitation*." App. G at a67-a68 (emphasis added). "Solicitation" is defined in Board policy and university regulation as "the sale or offer for sale of any property or service" or "receipt on request for any gift or contribution." On August 31, 1989, the university revised OL 9.05 to apply to free newspapers containing advertisements.

The regents' policy and university regulations on solicitation provide for three methods by which newspapers and other publications containing commercial advertisements may be distributed on campus. First, they may be dispensed from vending machines or distribution stands in areas designated by the university president. (At the time of trial, newspapers were distributed from forty-eight newsstands at five locations on campus.) Second, a registered student

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[1] Plaintiffs Demaree, Dodd and Ptak were students registered at the university during the times relevant to this suit.

organization may distribute such papers from a table, manned at all times by students, in the designated free speech area known as "the Quad." Third, students are allowed to subscribe to periodicals which may be mailed or delivered to them on campus. What students are not allowed to do is hand out newspapers or any other material with commercial advertising anywhere they choose on campus. By contrast, students may distribute material that does not contain commercial advertising throughout the campus outdoors.

On or about October 10, 1989, defendant/petitioner Burdenski wrote to the *Guardian* informing the distributors that they must either "provide a rack at one of the approved locations, or arrange delivery by subscription...." At about the same time, similar letters were sent to several other newspapers and magazines, including the *Houston Post*, the *Houston Chronicle*, the *Austin Chronicle*, *Take Five Magazine*, *The Plebeian*, and the *SWT Press*. When the plaintiffs continued to distribute the *Guardian* in the same manner, Mr. Burdenski wrote again on November 27, 1989, emphasizing that the *Guardian* could not be handed out to passersby on campus. Thereafter, the plaintiffs ceased publication of the *Guardian* when advertising revenue dried up[2].

On January 16, 1990, plaintiffs filed suit in state district court against the Texas State University System Board of Regents; Southwest Texas State University; defendant Supple, the university president; defendants Matheson, Perry, Drain, Longcope, Ouellette, Martin, Clark and Elder, the

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[2] At trial, the plaintiffs offered no evidence to indicate that restricting the distribution of the *Guardian* in accordance with the anti-solicitation policy caused advertising revenues to cease.

regents[3]; and defendant Burdenski.

After the plaintiffs amended their suit to add federal claims for violations of their rights to free speech and equal protection, the defendants removed the case to the United States District Court for the Western District of Texas. Subsequently, on the plaintiffs' motion, the district court remanded all claims against the Board of Regents and the university to state court, leaving before the federal court the claims against the individual defendants in their official and personal capacities.

After a bench trial on December 19, 1990, the Honorable Walter Smith issued Findings of Fact and Conclusions of Law and a Final Judgment on February 27, 1991. App. D, a27-a52; App. B, a25. In the decision, the trial court remanded all of plaintiffs' state law claims to state court and ordered that plaintiffs take nothing on their federal constitutional claims[4].

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the trial court's decision in part and reversed and remanded in part. 969 F.2d 111; App. A, a1-a24. In actions not presented for this Court's review by this petition, the court of appeals upheld university regulations insofar as they delegate to the dean of students the discretion to designate locations for newspaper vending machines and distribution boxes, upheld the university's subsidy of the official student newspaper from mandatory student fees, affirmed the district court's remand of state law

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[3] Petitioners Thomas R. Kowalski, Jane C. Monday, William L. Cunningham, and Becky R. Espino are successors in office to defendants Lee Drain, Edmund M. Longcope, III, Jack L. Martin and Sheila Wheatley Clark.

[4] In an amended judgment entered on March 22, 1991, the court corrected an oversight and, instead of remanding the plaintiffs' federal Sherman Antitrust Act claim to state court, ordered that Plaintiffs take nothing by that claim. App. C, a26.

claims to state court, and affirmed the district court's denial on qualified immunity grounds of the plaintiffs' claims for monetary damages against the defendants in their individual capacities. 969 F.2d at 122-126; App. A, at a18-a24. However, the court of appeals held that all of "the outdoor grounds of the campus such as the sidewalks and plazas are designated public fora for the speech of university students," that "[r]estricting distribution of newspapers with commercials was an anomalous departure from the general policy of protecting speech such as the political reporting and commentary in the *Guardian*," and that as a consequence, "the anti-solicitation regulations cannot be applied to forbid an individual student from handing out a newspaper solely because that paper contains advertisements." 969 F.2d at 116-118; App. A at a5-a9.

> In sum, we hold that the University may not enforce its anti-solicitation policy contained in either Operating Letter 9.05 or in applicable rules of the Board of Regents to restrain the distribution of the *Guardian* on the outdoor grounds of the campus. The *Guardian* is entitled to the same access to the University campus given to publications distributed without charge that do not contain commercials.

969 F.2d at 121; App. A at a16. The court then remanded the case for consideration of appropriate injunctive and declaratory relief, and possibly attorneys' fees. 969 F.2d at 126; App. A at a22-a24.

REASONS FOR GRANTING THE PETITION

1. The ability of a state university to restrict the distribution of commercial advertising on campus within the bounds of First Amendment protection of free speech is an important question of federal law which has not been, but should be, settled by this Court.

State university officials and federal courts need guidance from this Court because the issue is important, it requires a delicate balance between competing policy interests of great value, the court of appeals' decision places state college administrators in a difficult dilemma, and this Court has not directly addressed the question.

The court of appeals acknowledges as it must that a state university has at least *some* legitimate interest in restricting commercial solicitation on campus. 969 F.2d at 120-121; App. A at a14. This Court has "recognized that First Amendment rights must be analyzed 'in light of the special characteristics of the school environment,'" and consequently has "never denied a university's authority to impose reasonable regulations compatible with that mission [education] upon the use of its campus and facilities." *Widmar v. Vincent*, 454 U.S. 263, 267 n.5, 102 S.Ct. 269, 273 n.5 (1981). Even more directly on point, this Court has agreed that the state's interests in limiting commercial speech on a state higher education campus "are substantial: promoting an educational rather than commercial atmosphere on [state university] campuses, promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquility." *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 109 S.Ct. 3028, 3032 (1989).

Although the court of appeals seemed to minimize the problem, the threat posed by commercial solicitation to the academic environment is not one which state higher

education administrators may take lightly. More affluent than the population generally, more inclined to "discretionary spending," and concentrated together in a small area, university students constitute a tempting market for sellers. The judgment of academic administrators on the scene, that without significant limitations the campus would eventually be dominated by "unwarranted hawking" from "every ... salesperson ... in town," 969 F.2d at 120, either in person or through the Trojan horse of advertising within publications disseminated on campus, should not be lightly dismissed by the courts. Thus, in a variety of contexts, state university administrators have adopted anti-solicitation policies. For example, compare *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 109 S.Ct. at 3030; *Glover v. Cole*, 762 F.2d 1197, 1198-1200 (4th Cir. 1985); *Texas Review Soc. v. Cunningham*, 659 F.Supp. 1239, 1241-1242 (W.D. Tex. 1987).

On the other hand, while newspapers are a major vehicle for commercial advertising, petitioners will be the first to agree that the authors of the First Amendment, with recent memories of dissident presses closed down by British authorities, had newspapers prominently in mind. And students of an institution of higher learning have an undeniable interest in and right to access to such an important channel of information. This case, then, poses the question of how state higher education officials must strike the balance between the substantial state interest in restricting commercial solicitation and the special status of newspapers under the First Amendment. The petitioners sought to strike the balance not by banning publications with advertising from campus, but by restricting their distribution to locations and methods which are easily accessible to students without disturbing the educational atmosphere. Allowing for as many as 48 newsstands in five campus locations and extensive distributions through subscriptions and from student organization tables in the free speech area, the rule has not interdicted the spread of written speech on campus.

The court of appeals, by contrast, would strike the balance by placing state university administrators in a serious bind. The court of appeals concludes that because most of the content of the *Guardian* is not commercial speech and "[t]he advertisements in the *Guardian* were included to finance the publication," therefore "[u]nder such circumstances, commercial speech was inextricably linked to the newspaper's non-commercial speech, making the whole paper non-commercial." 969 F.2d at 120; App. A at a14. On the other hand, if the publication merely "comment[s] on public issues in the context of a commercial transaction," the university is free to regulate it as commercial speech. Thus, instead of a bright line rule, which only inquires as to whether the publication contains commercial advertising -- if it does not, it may be freely distributed outdoors by students; if it does, it is subject to the minimal restrictions described above -- school authorities now must choose between two unpalatable options. Either they must abandon any attempt to manage the flow of commercial advertising on campus, so that students may distribute any written matter at any outdoor location on campus; or state administrators must examine each publication proposed for distribution on campus and make a subjective determination as to the proportion of commercial to non-commercial speech. They must decide whether the document consists primarily of noncommercial speech, with advertisements merely "included to finance the publication,"[5] or rather consists of "comment[s] on public issues in the context of a commercial transaction." The administrator cannot be certain that relative space devoted to each will suffice to determine whether the literature is devoted predominantly to commercial or non-commercial speech. The distributer might well argue that while commercial advertising occupies more column inches, because that much space had to be sold in order to "finance the publication," the overriding purpose of the publication nevertheless is to present the less spacious non-commercial

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[5] For what other purpose would a publication include advertisements?

speech. Unavoidably, under the court of appeals formulation, state university administrators will be drawn into an undertaking which courts, universities, and free speech advocates ought to wish for them to avoid, *i.e.*, examining and evaluating speech for its content and "purpose".

This Court's jurisprudence presently does not resolve the dilemma. Rather, its First Amendment decisions merely identify the outer limits of the continuum within which this case falls. At one extreme, the Court has told state universities that when they open a forum to registered student organizations generally they may not deny the forum to an otherwise qualified organization solely on the basis of the content of its protected (in that case, religious) speech. *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269 (1981). At the other end of the spectrum, a state university may prohibit salespeople from entering campus residences to demonstrate their products to students, in presentations which incidentally "touch on other subjects" that are not purely commercial, even if the prohibition is not the least restrictive means of accomplishing the purposes of the anti-solicitation policy. *Bd. of Trustees of State University of N.Y. v. Fox*, 492 U.S. 469, 109 S.Ct. 3028 (1989). As a newspaper distributed and partially published by students, covering social and political issues, the *Guardian* certainly enjoys a more protected status than non-student Tupperware merchants seeking access to dormitories. On the other hand, as a mixture of advertising and commentary, which is already permitted quite substantial access to the campus (through receptacles in the newsstand locations, student organization tables in the free speech area, and subscriptions), the *Guardian* bears little if any resemblance to an otherwise qualified student organization denied access to a public forum solely because of the content of its members' protected speech. So, reading *Fox* and *Widmar* does not enable a court or board of regents to decide how to regulate the on-campus distribution of written material such as the *Guardian*.

To fit the *Guardian* on the *Widmar* end of the spectrum, the court of appeals relies on a decision of this Court holding that when commercial speech is "inextricably linked" to non-commercial speech, the entire speech is non-commercial. 969 F.2d at 120, App. A at a14, citing *Riley v. National Federation of the Blind*, 487 U.S. 781, 106 S.Ct. 2667 (1988). But as this Court explained in *Fox*, the *Riley* case dealt with otherwise fully protected speech which was required by law to include a commercial component. In that instance, the speaker had no choice but to mix non-commercial with commercial speech. *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 109 S.Ct. at 3031. In that sense, the two were "inextricably intertwined." *Id.*

> By contrast, there is nothing whatever "inextricable" about the noncommercial aspects of these presentations. No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. Nothing in the [challenged regulation] prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.

Id. Petitioners read the foregoing passage as permitting a court to look only at the face of the contested policy to see whether it necessarily prevents the writers from conveying (or the students from reading) their non-commercial message. Applying that analysis, petitioners argue that no law of man or nature makes it impossible to write about environmental, peace, and social justice issues without selling products and services through paid ads. However, the court of appeals seems to have viewed the commercials as "inextricably intertwined" with the political and social commentary because the publishers needed to sell the former in order to finance the printing of the latter. If that is to be the standard, and

if a state university is to guard against the transformation of the free marketplace of ideas into a commercial market of goods and wares, then school administrators must assess the extent to which commercial advertising is essential to the existence of the publication in question. So now, not only must state officials scrutinize the noncommercial content of the material to determine whether the publication is predominantly social/political commentary relying on advertising only for funding, or primarily commercial with merely a gloss of public interest. They now must also examine the publishers' books to determine the financial necessity of the advertising. How ironic that such intrusions are to be compelled in the name of the First Amendment.

If the foregoing is to be the result, this Court should say so. Upon the granting of certiorari, the parties can argue to the Court in more depth exactly where on the *Fox* to *Widmar* continuum off campus publications with commercial advertising belong and precisely where the balance must be struck between freedom of speech and the state's substantial interest in restricting commercial solicitation on public university campuses. But regardless of where such lines are ultimately drawn, it is vitally important to all concerned that this Court help guide the drawing.

2. The decision by the court of appeals holding that all of the outdoor grounds of Southwest Texas State University constitute designated public fora for students conflicts with the decision of another circuit and with applicable decisions of this Court.

Whether all outdoor locations on the campus of the university are "public fora" for students is a matter of considerable importance. If a state university has opened a forum to the public (or to its students as a "public") it may

not restrict access to the forum except by means "narrowly drawn to effectuate a compelling state interest." *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46, 103 S.Ct. 948, 955 (1983), citing *Widmar v. Vincent*, 454 U.S. at 269-270, 102 S.Ct. at 279. By contrast, "[p]ublic property which is not by tradition or designation a forum for public communication is governed by different standards." *Id.* On the latter premises, "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Assn.*, 460 U.S. at 46, 103 S.Ct. at 955, citing *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 129, 101 S.Ct. 2676, 2684 (1981).

Consequently, what is at stake here is not only the ability of the university to restrict the distribution of periodicals with commercial advertising to designated locations on campus. The ruling also sharply curtails the university's ability to restrict other protected expressive activity, such as public assembly, in outdoor locations beyond the university's designated free speech area -- for example, sidewalks, parking lots, and the grounds in front of classroom buildings. To reach the conclusion it did, the court of appeals reasoned as follows:

> Defendants argue that the outdoor grounds of the University cannot be a designated public forum, because the University has not allowed unrestricted access to the campus, even by students. Government property, however, does not automatically cease to be a designated public forum because the government restricts some speech on the property. Otherwise, the restriction of speech on government property would be self-justifying. The restriction would disprove any intent to create a designated public forum, and

> the failure to create a public forum would justify the restriction of speech. The Supreme Court has not adopted such circular reasoning.

969 F.2d at 117; App. A at a8.

But it is the reasoning of the court of appeals that is circular. To say that university property "does not automatically cease to be a designated public forum" assumes the conclusion which the court reaches, that the property was already a public forum when the university sought to restrict access. But Supreme Court authority relied upon by the court of appeals exposes the error of beginning the analysis with the assumption that university property is a public forum.

> A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.

Widmar v. Vincent, 454 U.S. at 267 n.5, 102 S.Ct. at 273 n. 5. (Streets and parks, of course, are "quintessential public forums." *Perry Educ. Assn.*, 460 U.S. at 45, 103 S.Ct. at 954-955.) Since the premises of a state university campus thus are not places which have been open to the public "by long tradition...immemorially... [for] time out of mind...," intended restrictions articulated by the university's governing authorities are highly relevant to a determination of which parts of a campus are designated public fora.

Although the facts differ in some elements, the reasoning of the Ninth Circuit in *Planned Parenthood v. Clark County School Dist.*, 941 F.2d 817 (9th Cir. 1991), would compel a different result if applied to this case. *Planned Parenthood* dealt with content-based restrictions on advertising in a public high school newspaper. At first glance, the case appears distinguished by the holding which "invest[s] high school educators with greater control over expressive activities that bear the school's imprimatur than other forms of speech or use of government facilities." *Id.*, 941 F.2d at 819. However, that distinction is balanced by the difference that the authorities in *Planned Parenthood* imposed a much greater restriction on speech, *i.e.*, rejecting an advertisement solely because of its content. So, after controlling for the factor of greater official discretion in the context of a more severe restriction, what remains of the court's reasoning applies to the *Hays County Guardian* facts.

Relying on *Perry Educ. Assn.*, *supra*, and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562 (1988), *inter alia*, the Ninth Circuit reasoned in pertinent part

> . . . that "school facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,' or by some segment of the public such as student organizations." If, on the other hand, school facilities have been reserved for other intended purposes, "communicative or otherwise," no public forum will have been created and reasonable restrictions on speech may be imposed.

941 F.2d at 822 (citations and footnote omitted). By the foregoing analysis, the university campus in this case would be deemed reserved for educational purposes rather than for indiscriminate use by students. *Compare Glover v. Cole*, 762 F.2d at 1202. The very Board policy cited by the court of

appeals makes "free speech activities" subject to time, place, and manner restrictions. 969 F.2d at 117; App. A at a7. Pursuant to that authority, university regulations exclude from free public distribution materials which "contain impermissible solicitation." *Id.*

The university and its regents have only opened particular portions of the campus as a public forum for students. That arrangement provides meaningful opportunities for students to exercise their rights of expression and offers meaningful access to students by newspapers and periodicals, while assuring the orderly functioning of the university as an educational institution. Without justification under the applicable decisions of this Court, the court of appeals erased the distinctions among locations on campus and needlessly upset the delicate balance between the First Amendment and the exigencies of academic administration. The decision should not be allowed to stand.

CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-8168

HAYS COUNTY GUARDIAN, ET AL.,
Plaintiffs-Appellants,

v.

JEROME K. SUPPLE, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas

August 10, 1992

Before GOLDBERG, HIGGINBOTHAM, and DAVIS, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

Hays County Guardian, a newspaper, and students currently enrolled at Southwest Texas State University contend that University regulations unconstitutionally restrict distribution of the *Guardian* on campus. Plaintiffs also contend that the University has granted an inadequately fettered license to its officials to regulate activity protected under the First Amendment and that the University's use of mandatory student fees to finance a student-run newspaper violates the First Amendment.

We find that plaintiffs' objections to official discretion and university funding of the university paper are meritless, but we conclude that the University's regulations against on-campus solicitation unconstitutionally restrict the distribution of the *Guardian*. We affirm the remand to state court of state-law claims. Finally, we find that defendants in their individual capacity enjoy qualified immunity to any damages or attorney's fees that might be awarded in the federal suit.

I.

The *Hays County Guardian* and students filed this action in Texas state court against various officials of Southwest Texas State University and the Board of Regents of the Texas State University System in their official and individual capacities.[1] Plaintiffs alleged that defendants violated their right to equal protection of the laws and to free speech under both the Texas and U.S. Constitutions, later adding claims under the Sherman Anti-Trust Act, 15 U.S.C. § 1, the Texas Constitution, the Texas Free Enterprise and Anti-Trust Act of 1983, and the Texas Civil Practice and Remedies Code, § 104.002-003. Plaintiffs sought monetary, injunctive, and declaratory relief.

Defendants removed the case to federal district court. In its final amended judgment following a bench trial, the district court remanded all state-law claims to Texas state court and held that plaintiffs should take nothing on all remaining claims. Plaintiffs argue here that the district court erred in dismissing the constitutional claims and in remanding the state-law claims to state court.

The *Hays County Guardian* is a small local newspaper, founded in 1989, concentrating on "environmental, peace, and social justice issues." Distributed free of charge

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[1]The original defendants included the Texas State University System Board of Regents and Southwest Texas State University. On the plaintiffs' motion, the federal district court remanded all claims against these two defendants to Texas state court. Appellants do not seek a reversal of dismissal.

throughout Hays County, its publication expense was covered by donations and revenue from advertising by local businesses.

Southwest Texas State University is a Texas state university located in San Marcos, Texas with approximately 22,000 students. 5,000 students live on campus.

The University allows students to participate in a broad range of expressive activities on campus. Board of Regents rules provide that "[a]ny group or person . . . may assemble and engage in free speech activities on the grounds of the campus." The University's Operating Letter Number 9.06 also allows students to "publicly distribute outdoors, on grounds owned or controlled by the University, . . . pieces of literature that are not obscene, vulgar, or libelous, or that do not contain impermissible solicitation." One part of the campus, a plaza between several University buildings known as the Quad, has been designated by the University as a "free expression area" and can be reserved by students for demonstrations and "symbolic structures." Students may hand out pamphlets, newspapers, and any other literature without advertisements throughout the outdoor areas of the campus.

This general policy of openness to expressive activity is qualified by the University's limits on commercial solicitation. Both the written regulations of the Board of Regents and the University's Operating Letter 9.05 generally prohibit "solicitation" on campus. "Solicitation" is defined as "the sale or offer for sale of any property or service" or "receipt on request for any gift or contribution." Before August 31, 1989, the university did not apply its solicitation restrictions to newspapers that were distributed free of charge, even if those newspapers contained advertisements. On August 31, the Dean of Students instructed the University's counsel to revise the University's "Operating Letter 9.05" concerning solicitation so that free newspapers containing advertisements would be treated as prohibited solicitation.

Board of Regents policy prohibiting solicitation has three relevant exceptions. First, the University permits the

sale of "any newspaper, magazine, or other publications by means of a vending machine or distribution stand in an area designated in advance by the President [of the University]." At the time of trial, there were a total of 48 newsstands at five locations on campus.

Second, the University permits "activities . . . sponsored by a registered student organization . . . which are authorized and scheduled in accordance with the facilities use regulations . . . as long as all aspects of the activity clearly identify the organization sponsoring the event on all signs, tickets, or literature." According to trial testimony, a registered student organization could distribute a newspaper containing advertisements by setting up a table in the Quad manned at all times by a student. The student must remain behind the table and may not approach others to distribute the paper. Finally, the University permits students to subscribe to periodicals, which may either be sent through the mails or directly delivered to the student on campus.

Newspapers containing commercials may be distributed on campus only through these three methods of distribution. The *University Star*, a University-owned newspaper run by the students in the Journalism Department, is not subject to any of the University's otherwise applicable restrictions, despite the fact that it contains advertisements. Most of the *Star's* budget derives from advertising revenues, but the *Star* is also funded in part by mandatory student fees. The *Star*'s method of distribution is determined by the Star's staff and the Journalism Department Faculty, who distribute the paper at about forty drop-off sites and newsracks throughout the campus.

The *Guardian* was notified of this new policy on October 10, 1989, when Tom Burdenski, an assistant director of the student center, wrote to the *Guardian* to warn the paper that it had improperly distributed copies of the *Guardian* in "academic departments, inside the student center, and the Quad Area." The letter informed the *Guardian* that "[n]ewspapers may be circulated on campus in one of two ways"--through the covered newsstands at designated locations and through subscriptions "arranged by

the university department in advance" that are either directly delivered or sent through the mail. Similar letters were sent to seven other periodicals that had apparently violated the University's newspaper distribution policy.

The *Guardian* published Burdenski's letter in their paper. Despite Burdenski's warning, the *Guardian* continued to deliver its paper on campus. Burdenski sent a second letter repeating the University's restrictions on newspaper distribution and threatening to refer "further violations . . . to the University Attorney for appropriate action." The *Guardian*'s advertising revenue dried up, and the newspaper ceased publication.

II.

The district court found that the rules contained in the Board of Regents' regulations and the University's Operating Letter Number 9.05 did not violate the *Guardian's* and students' rights under the First Amendment. This conclusion is a mixed question of fact and law that we review *de novo*. *International Society for Krishna Consciousness v. Baton Rouge*, 876 F.2d 494, 496 (5th Cir. 1989).

It is undisputed that the speech in question--distribution of a newspaper containing political and social commentary and reportage--is protected speech. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981). There is also no contention that the government must hold open all government-owned or government-controlled property to all forms of speech. *See Cornelius v. NAACP Legal Defense & Educ. Fund*, 105 S.Ct. 3439, 3447 (1985). The parties concede, as they must, that a speaker's right to access government property is determined by the nature of the property or "forum." *Perry Educ. Ass'n v. Perry, Local Educators' Ass'n*, 460 U.S. 37, 103 S.Ct. 948 (1983).

The right of access to government-owned property for expressive activity is greatest when the property is a "public forum." Government property is a "traditional public forum" if the property has traditionally been used by the public for purposes of assembly and debate. *Perry Educ. Ass'n*, 103

S.Ct. at 955. *See also United States v. Kokinda*, 110 S.Ct. 3115, 3119 (1990). The government may also create public fora on property not traditionally used for public expression by intentionally opening it for public discourse. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 60 U.S.L.W. 4749, (June 26, 1992).

The government may designate a forum for the public at-large or only for certain speakers or for the discussion of only certain subjects. *Cornelius*, 105 S.Ct. at 3449; *Perry Educ. Ass'n*, 103 S.Ct. at 955 n.7. In each case, speech for which the forum is designated is afforded protection identical to the protection provided to speakers in a traditional public forum. *Kokinda*, 110 S.Ct. at 3119.

Regulation of expressive activity on property that has been made available for public expression is limited. Content-based restrictions must be necessary to serve a compelling state interest and be narrowly drawn to achieve that end. Significantly, even content-neutral restrictions must be narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. *Frisby v. Schultz*, 108 S.Ct. 2495, 2499-501 (1988); *International Society for Krishna Consciousness*22, 876 F.2d at 497.

The government may reasonably limit speech in a non-public forum as long as the limitation is "not an effort to suppress expression because public officials oppose the speaker's view." *International Soc'y for Krishna Consciousness*, 879 F.2d at 494. Even a complete prohibition on speech is permissible if the prohibition is reasonable and content-neutral. *Id.*

A.

The district court found that the campus of Southwest Texas State University is not a public forum by either tradition or government design. We disagree. The undisputed facts show that the outdoor grounds of the campus such as the sidewalks and plazas are designated public fora for the speech of university students.

The Supreme Court has noted that the "campus of a

public university, at least for its students, possesses many characteristics of a public forum." *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981). *See also Healy v. James*, 408 U.S. 169, 180 (1972). Roughly 5,000 students live and work on the campus, making the campus, in the words of the University's own promotional booklet, a "town" of which the resident student will be a "contributing citizen" and "voting member." The campus's function as the site of a community of full-time residents makes it "a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment," *Heffron v. International Soc'y for Krishna Consciousness*, 101 S.Ct. 2559, 2566 (1981), and suggests an intended role more akin to a public street or park than a non-public forum. *See Hague v. CIO*, 307 U.S. 496, 515 (1939).

Southwest Texas State University's written policies further support the conclusion that the University intended the campus to serve as a public forum for its students. The Board of Regents' Rules state that:

> "Any group or person, whether or not a student or employee, and whether or not invited by a registered student, faculty, or staff organization, may assemble and engage in free speech activities on the grounds of the campus. However, the University President or an authorized designee may adopt reasonable nondiscriminatory regulations as to time, place, and manner of such activities. The President, or the authorized designee, may prohibit such activities if it is determined, after proper inquiry, that the proposed speech constitutes a clear and present danger to the University's orderly operation as defined in Subsection 4.4 below."

Interpreting this general policy of protecting "free speech activities" on campus, Southwest Texas State University's Operating Letter 9.06, § 2.02 allows any "student or an

organization [to] publicly distribute *outdoors, on grounds owned or controlled by the University*, petitions, handbills, or pieces of literature that are not obscene, vulgar,or libelous or that do not contain impermissible solicitation." (Emphasis added).

The University requires only that the literature being distributed "identify the student or organization distributing it" and that the distribution not interfere with "free and unimpeded flow of pedestrian and vehicular traffic or disturb . . . academic, institutional, or other approved activities." The clear implication of the Operating Letter is that the University intends its outdoor grounds to be a forum for student distribution of literature.

Finally, we note that the University authorizes the widespread distribution on campus of the *University Star*, the newspaper owned by Texas Southwest State University and controlled by student editors. The *Star*, like the *Guardian*, carries editorials, news stories, and advertisements.

All of this evidence compels the conclusion that the University deliberately fosters an environment in which students may freely distribute newspapers, pamphlets, and other literature concerning public affairs "outdoors, on grounds owned or controlled by the University," subject to the limits necessary to preserve the academic mission and to maintain order.

Defendants argue that the outdoor grounds of the University cannot be a designated public forum, because the University has not allowed unrestricted access to the campus, even by students. Government property, however, does not automatically cease to be a designated public forum because the government restricts some speech on the property. Otherwise, the restriction of speech on government property would be self-justifying. The restriction would disprove any intent to create a designated public forum, and the failure to create a public forum would justify the restriction of speech.

The Supreme Court has not adopted such circular reasoning. *See Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 378 n.9 (5th Cir. 1989). Rather, the Court looks to whether the government was motivated by "an affirmative

desire," *Cornelius*, 105 S.Ct. at 3450, or "express policy," *Id.* at 3449, of allowing public discourse on the property in question. Such a general policy of open access does not vanish when the government adopts a specific restriction on speech, because the government's policy is indicated by its *consistent* practice, not each exceptional regulation that departs from the consistent practice. *Stewart v. District of Columbia Armory Bd.*, 863 F.2d 1013, 1017 (D.C. Cir. 1988).

The University authorizes students to distribute by hand literature on matters of public concern on the outdoor parts of the campus. Restricting distribution of newspapers with commercials was an anomalous departure from the general policy of protecting speech such as the political reportage and commentary in the *Guardian*. This departure did not alone redefine the forum. We conclude that the district court erred in finding that the university is not a limited public forum, designated for the speech of students.

B.

Having found that the University's outdoor premises are a designated public forum, we must ascertain whether the regulations impermissibly restrain free expression. We will assume *arguendo* that prohibiting the handing out of newspapers containing advertisements on campus does not discriminate on the basis of content. Even so, we find that the anti-solicitation regulations cannot be applied to forbid an individual student from handing out a newspaper solely because that paper contains advertisements.

Even a content-neutral regulation of speech on a public forum must be narrowly tailored to serve a significant government interest and must leave open ample alternative channels of communication. *Ward v. Rock Against Racism*, 109 S.Ct. 2746, 2753 (1989); *Clark v. Community for Creative Non-Violence*, 104 S.Ct. 3065, 3069 (1984). A regulation is "narrowly tailored" when it does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 109 S.Ct. at 2758. At a minimum, a regulation cannot be narrowly tailored unless the cost to speech is "carefully calculated" and the fit between

the burden and the state interest is "reasonable." *Bd. of Trustees of State University of New York v. Fox*, 109 S.Ct. 3028, 3035 (1989). The government bears the burden of establishing that the regulations are reasonable. *Id.* Even a legitimate government interest cannot justify a restriction if the restriction accomplishes that goal at an inordinate cost to speech.

The University's anti-solicitation provision contained in the University's Operating Letter 9.05 prohibits a student from handing out a free newspaper with advertising on campus unless that student belongs to a registered student group that has agreed to "sponsor" the paper. Even then, the student group sponsoring the paper must distribute the paper only from a manned table and may not hand the paper to passing students. These restrictions do not apply to the *Star* or to any publication without advertising.[2]

This restriction on the distribution of newspapers is not de minimis. It forecloses one medium of distribution for newspapers with commercials--individual students' distribution of unsponsored papers by hand. Registered student groups could "sponsor" papers, a service for which the group would generally demand a fee. However, an individual student volunteer, lacking a student group's sponsorship, is prohibited from handing out free copies of the *Guardian* to other students while on campus.

Moreover, the anti-solicitation policy restricts an individual's ability to hand out political commentary to the passing public. This medium of communication is traditionally afforded great protection under the First Amendment because of its value to "poorly financed causes of little people." *Martin v. Struthers*, 319 U.S. 141, 146 (1943). *See also Lovell v. City of Griffin*, 303 U.S. 444, 454 (1938) (pamphlets and leaflets "have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine

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[2]The Dean of Students, Dr. Garrison, agreed at trial that, "if I've got a newspaper that does not contain any advertising in it and I'm a student, I can distribute it anywhere on campus."

and others in our own history attest"). The undisputed testimony was that handing out the *Guardian* on campus was a more effective medium of delivery than distribution through newsstands. Even a content-neutral restriction on such a basic and traditional medium of distribution cannot be justified by trivial gains in convenience or insignificant reductions of litter. *Schneider v. State*, 308 U.S. 147, 164 (1939). *See also* Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 95 (1987). Of course, the *Guardian* could avoid these restrictions by not printing commercials. Without commercials, however, the *Guardian* could not meet expenses.

The district court found that the restrictions on the *Guardian*'s distribution advanced several interests including preserving the academic environment and security, protecting privacy, traffic control, preserving the campus's appearance, preventing fraud and deception, and eliminating unnecessary expenses.

There is no substantial evidence that a student's handing out of a free student newspaper would affect the University's academic mission or the rate of crime on campus. The handing out of a political newspaper filled with editorials and reportage about matters of public concern is compatible with the University's academic mission.

The University has a legitimate interest in preventing litter, congestion, and invasions of privacy on campus. Handing out a newspaper on campus might increase the risk of litter, cause more congestion, and lead to students approaching other students who do not wish to be approached. However, the burden is on defendants to show affirmatively that their restriction is narrowly tailored to protect the identified interests. *Fox*, 109 S.Ct. at 3035; *Multimedia Publications v. Greenville-Spartanbura Airport*, 774 F.Supp. 977, 985 (D.S.C. 1991).

Defendants failed to carry this burden. They darkly warn in their brief that, because "approximately fifty papers are distributed [from newsstands on campus]," allowing newspapers to be distributed free of charge on the campus would "seriously impact access to buildings, create an

excessive litter problem, and create a bazaar-like atmosphere on campus." This statement about "fifty newspapers," misrepresents the record. There were forty-eight *newsstands*--not newspapers--on the campus at five different locations. Each had newsstands containing the same major Texas and national papers--*USA Today*, *The New York Times*, *Wall Street Journal*, *The Houston Post*, *San Antonio Light*, *Dallas Morning News*. There was no evidence that these papers are handed out on campus.

Assuming that the University faced some marginal increase of litter, congestion, and unwelcome advances by over-zealous, newspaper-wielding students, there is no substantial evidence that the anti-solicitation regulations were reasonably well fitted to preventing these ills. If the University wishes to prevent litter, it should prohibit littering. *Schneider v. State*, 308 U.S. 147, 162 (1939). If it wishes to prevent overcrowding, then the University should regulate the time and place of students who hand out papers on the campus to prevent congestion. *Cf. Lee*, 60 U.S.L.W. at _____ (O'Connor, J., concurring). If the University wants to prevent obstreperous distribution of the papers, then it should forbid students from pressing their publications on unwilling recipients. *Martin v. Struther*, 318 U.S. 141, 148 (1943). Prohibiting students from handing out free "unsponsored" newspapers on the grounds that the newspapers include an advertisement, no matter how willing the recipient or how neat and circumspect the distributor, is not a narrow tailoring to protect identified interests.

The speculative nature of the threat from litter and congestion is illustrated by the fact that the University freely allows distribution of publications that do not contain "solicitation," defined as an "offer for sale of any property or service" or "receipt of or request for any gift or contribution." Students may, in the University's judgment, pass out pamphlets, announcements, artwork, or any other literature not containing commercials without overwhelming the campus with litter or congestion. Allowing the same students to include a single advertisement in identical literature to defray the printing expense would, it is said, impede "access

to buildings, create an excessive litter problem, and create a bazaar-like atmosphere on campus." There is no record evidence that publications with commercials create significantly more litter and congestion than publications without. We do not find such a conclusion intuitively obvious.

The University places no restriction on the *University Star*, a paper that contains a greater number and density of advertisements than the *Guardian*.[3] 12,000 copies of each issue of the *Star* were distributed on the campus. This underinclusiveness cuts against the assertion that restricting commercialism on campus was an interest of paramount importance to the University--or at least an interest that required a flat prohibition on an entire medium of distribution. *See The Florida Star v. B.J.F.*, 109 S.Ct. 2603, 2612-13 (1989) (Scalia, J., concurring) (prohibition on mass media that is not applied to other forms of communication, cannot be regarded as protecting interests of highest order, because "it leaves appreciable damage to that supposedly vital interest unprohibited"); *United States v. Gilbert*, 920 P.2d 878, 885 (llth Cir. 1991) ("an injunction that prohibits [appellant] from engaging in expressive conduct [on a public forum] that others are free to engage in clearly cannot withstand strict scrutiny").

Aside from litter, congestion, and invasions of privacy, defendants argue that "the restrictions of commercial materials is [sic] necessary to maintain the academic environment," because "unlimited distribution of newspapers, coupons, flyers, and the like throughout campus would create a circus atmosphere, destroying the unique quality of the University campus." We can assume without deciding that

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[3]The *Guardian* generally contained less than fifteen advertisements of local businesses per eight-page issue. By contrast, the *Star* ran full pages of advertisements containing well over twenty ads from local businesses, not to mention a page of classified advertisements. In addition, the *Star* sometimes included a separate national, full-color insert containing advertisements targeted toward University students.

the University may have interests sufficient to justify restrictions on commercial speech, because speech that does little more than propose a commercial transaction occupies a subordinate position in the hierarchy of First Amendment values. *Fox*, 109 S.Ct. at 3032.

However, little follows here from such an assumption, because the *Guardian* is not commercial speech. It is speech about matters of highest public concern--political and economic reform and the local and international environment. The advertisements in the *Guardian* were included to finance the publication. Under such circumstances, commercial speech was inextricably linked to the newspaper's non-commercial speech, making the whole paper noncommercial. *Riley v. National Federation of the Blind*, 108 S.Ct. 2667, 2677 (1988). If the purpose of the University's regulation is to limit commercial speech, then it is overbroad when applied to newspapers like the *Guardian*. At the same time, commenting on public issues in the context of a commercial transaction does not elevate speech from commercial to political rank. *See Bolger v. Youngs Drug Products Corp.*, 103 S.Ct. 2875, 2881 (1983).

Defendants emphasize another interest. As the Dean of Students testified, the anti-solicitation policy served to protect the students from "unwarranted hawking [of] every Tupperware Salesperson, pots and pans salesman in . . . town."

We recognize that government may have an interest in restricting commercial solicitation of passers-by to prevent disruption of traffic and harassment by insistent hawkers. *Soc'y for Krishna Consciousness*, 876 F.2d at 497 (citing *Heffron*, 101 S.Ct. at 2567). *See also Lee*, 60 U.S.L.W. at ___ ; *ACORN v. City of Philadelphia*, 798 F.2d 1260, 1269 (9th Cir. 1986). *Glover v. Cole*, 762 F.2d 1197, 1202 (4th Cir. 1985). Because solicitation requires purchasers or contributors to stop, listen to a sales pitch, and then produce a payment or contribution, it "can prove more disruptive of order and crowd control" than simple distribution of literature. *International Soc'y for Krishna Consciousness*, 876 F.2d at 497. *See also Kokinda*, 110 S.Ct. at 3123. Moreover,

face-to-face solicitation "presents risks of duress that are an appropriate target of regulation." *Lee*, 60 U.S.L.W. at ____.

Neither of these concerns is implicated by the handing out of a paper gratis. The passer-by's response to the distributor of a newspaper is simply to take or reject the paper. She need not stop and disrupt traffic. When the distributor does nothing more than proffer a paper for which no compensation is asked, there is also little risk of fraudulent over-reaching. The need to restrict hawking and sales, therefore, does not justify the restrictions on the *Guardian*. In fact, this court has found restrictions on solicitation narrowly tailored precisely because they did not restrict "oral advocacy, *distribution of literature*, or other forms of communication and expression." *Soc'y for Krishna Consciousness*, 876 F.2d at 498 (emphasis added). *See also Lee*, 60 U.S.L.W. at ____ (O'Connor, J., concurring) (distinguishing solicitation from distribution of literature).

Finally, defendants state that the University has a valid educational interest in protecting the *Star* from competition from other newspapers. According to defendants, this serves "a legitimate state interest--education of the students enrolled in the journalism program."

This argument rests on the assumption that a University may enhance the popularity of its own publication by burdening the distribution of other publications. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). Proper time, place, and manner requirements "do not discriminate *among speakers* or ideas" and "further an important governmental interest *unrelated to the restriction of communication*." Id. at 18 (emphasis added). The restriction of newspapers other than the *Star* cannot be justified by the University's desire to curtail the restricted newspapers' popularity.

Defendants argue that the University need not give students and non-students equal access to the University campus. This assertion is true. *Perry Educ. Ass'n*, 103 S.Ct. at 954. However, plaintiffs do not contest the University's

exclusion of nonstudents from campus. They challenge the anti-solicitation regulation's application to students who wish to distribute the *Guardian* to other students or, for that matter, wish to distribute their *own* paper containing commercials.[4]

In sum, we hold that the University may not enforce its antisolicitation policy contained in either Operating Letter 9.05 or in applicable rules of the Board of Regents to restrain the distribution of the *Guardian* on the outdoor grounds of the campus. The *Guardian* is entitled to the same access to the University campus given to publications distributed without charge that do not contain commercials. We express no opinion about the constitutionality of other time, place, and manner restrictions.

III.

Plaintiffs also contend that the University's regulations are facially unconstitutional because they bestow unlimited discretion on the Dean of Students to limit the distribution of newspapers on campus. Plaintiffs point to Section 2.02(a) of Operating Letter 9.05, which provides for the "sale or offer for sale of any newspaper, magazine, or other publication by means of a vending machine or distribution stand in an area designated in advance by the Dean of Students (or designee) for the conduct of such activity.[5]

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[4]Several University students have worked on the *Guardian's* staff as writers.

[5]The plaintiffs also point to an internal 1977 memo from the Dean of Student Life, Dr. Joseph Belvilaqua, to the Director of Student Development. In this memo, Dr. Belvilaqua states that

> "I will ultimately be responsible for making decisions regarding the reasonableness, taste, decency, etc. of such publications [i.e., publications covered by the oncampus solicitation Operating Letter] for distribution on-campus. As you well know, decisions regarding such

Plaintiffs contend that this discretion to designate areas for newsstands violates the First Amendment. We disagree.

In challenging the discretion given to the Dean of Students in designating newsstands, plaintiffs rely on City of *Lakewood v. Plain Dealer*, 108 S.Ct. 2138 (1988). In *Plain Dealer*, a newspaper challenged facially a municipal ordinance requiring the newspaper to obtain a license annually in order to place a newsstand on city-owned sidewalks. The ordinance delegated to the mayor the decision to grant or deny applications for newsstand permits, but provided no standards to guide the mayor's discretion.

Justice Brennan, writing for four members of the Court, stated that "a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Plain Dealer*, 108 S.Ct. at 2145. The Court held that the City ordinance was facially unconstitutional, because it gave unbridled discretion to the mayor to deny individual newspapers' applications for newsstand licenses.

The University regulation in this case is distinguishable from the City ordinance in *Plain Dealer*. The City ordinance gave the mayor discretion to "permit[] communication by some but not for others": the mayor could grant or deny *individual* publications' applications for a license to erect a newsstand on the sidewalk. It was this ability to discriminate among different publications that "raise[d] the specter of content and viewpoint censorship." *Plain Dealer*, 108 S.Ct. at 2147.

> standards are usually based upon broadly stated regulations; and I will depend on you and the staff members in helping arrive at decisions in approving or disapproving certain items from time to time."

This internal memo, however, says little about the discretion to restrict speech allowed by the University's regulations. The plaintiffs presented no evidence that Dr. Belvilaqua's interpretation of the regulations was ever promulgated or enforced.

By contrast, the Dean's discretion extends only to the initial designation of areas of the campus reserved for newsstands. Once such areas have been designated, the record suggests that any newspaper could place its stand in the area without further approval from the Dean[6] " Because the University regulation provides no opportunity to discriminate among different publications, the Dean's discretion under the regulations does not implicate *Plain Dealer's* concerns about content discrimination.[7] Plaintiffs' facial attack on the Dean's discretion to designate areas for newsstands is without merit.

IV.

Plaintiffs contend that the University's funding of the *University Star* with student fees violated their First Amendment right not to subsidize views with which they disagree. We disagree.

It is well-established that the freedom of speech and association protected by the First Amendment includes the freedom to choose "both what to say and what *not* to say." *Riley v. National Federation for the Blind*, 108 S.Ct. 2667, 2677 (1988) (emphasis in original). *See also Wooley v. Maynard*, 430 U.S.705 (1977). This right to refrain from speech is violated when the government compels an individual to endorse a belief that she finds repugnant. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943). It also may be violated when the government compels an individual to subsidize "political and ideological purposes," *Lyng v.*

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[6]*The letters sent to various newspapers warning them not to distribute their papers by hand on campus, state without qualification that "you may place newspaper dispensers in the [designated areas]."*

[7]Each approved location for newsstands was approved for a limited number of stands. If the spaces for stands were exhausted at the approved locations, then the *Guardian* would have to apply for additional space on which to place a stand. However, there is no evidence in this record that the space at the approved locations was inadequate to accommodate the *Guardian's* stand.

International Union, United Auto Workers, 108 S.Ct. 1184, 1191 (1988), with which she disagrees. *Chicago Teachers Union Local No. 1 v. Hudson*, 106 S.Ct. 1066, 1073 (1986); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977).

The government does not, however, violate the First Amendment whenever it forces an individual to subsidize speech. Any such position would implicate many state subsidies for public universities, for free speech is at the heart of teaching and universities by definition support speech--often extremely controversial speech. *See Widmar*, 454 U.S. at 278-79, 102 S.Ct. at 2?9 (Stevens, J., concurring). Rather, the First Amendment prohibits the government from forcing an individual to contribute to the ideological expression of other private citizens for the purpose of advancing those citizens' ideological biases rather than substantial public interests.

In *Abood*, for instance, the Court upheld state requirements that teachers pay a fee to the union for the purpose of supporting collective bargaining, even though such coerced contribution would have "an impact on [the dissenting teachers'] First Amendment interests." *Abood*, 431 U.S. at 222. The Court reasoned that the interference with the employee's freedom to associate was constitutionally justified by "the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Id.*

The lesson of *Abood*, therefore, is that the government may compel an individual to subsidize non-governmental speech when such compulsion accomplishes the "government's vital policy interest." *Lehnert v. Ferris Faculty Ass'n.*, lll S.Ct. 1950, 1959 (1991). *See Carroll v. Blinken*, 957 F.2d 991, 997 (2d Cir. 1992) (citing cases)- The question here is whether a University-sponsored newspaper advances an important educational purpose in a narrowly tailored manner.

We find the University's educational goals sufficiently weighty to justify the University's subsidy of a student-run newspaper. Such a newspaper allows students to have first-hand journalism experience difficult to obtain otherwise.

It also creates a forum for public discussion of University-related issues that can "stimulate uninhibited and vigorous discussion on matters of campus and public concern." *Carroll*, 957 F.2d at 1000. The *University Star* "increases the overall exchange of information, ideas, and opinions on the campus," *Kania v. Fordham*, 702 F.2d 475, 480 (4th Cit. 1983), and thus advances a central purpose of the University. *Carroll*, 957 F.2d at 1001. *See also Keyishan v. Bd. of Regents*, 385 U.S.589, 603 (1967) (noting importance of robust debate to University).

We also find that the University's financial support for the student-run newspaper is a narrowly tailored means of advancing these interests. The record indicates that the University did not attempt to control the viewpoints expressed by the newspaper and that there were no ideological prerequisites for joining the paper's staff. The University provided the students with the funds needed for the students themselves to engage in debate and did not force ideological conformity. This method of creating a forum for student expression is a minimally restrictive means of advancing an educational interest. *Kania*, 702 P.2d at 480 (upholding university financing of student newspaper through mandatory fees); *Veed v. Schwartzkopf*, 353 F. Supp. 149, 152 (D.Neb. 1973) (same).

Plaintiffs contend that the University "exercises considerable control over the views expressed in the *Star*." We find no evidence of such control in the record. On the contrary, the record shows that the *Star* attacked the University's administration vigorously, in one cartoon comparing that administration to the South African government. The University appointed a faculty representative from the Journalism Department to assist in the paper's publication, but there is no evidence that the faculty adviser controlled the newspaper's content.

Plaintiffs rely heavily on the Third Circuit's opinion in *Galda v. Rutgers University*, 772 F.2d 1060 (3d Cir. 1985), in which the court held that Rutgers University could not subsidize the New Jersey Public Interest Research Group with mandatory student fees. *Galda* has little relevance to

this case. First, we note that the Second Circuit has rejected *Galda*. *Carroll v. Blinken*, 957 F.2d 991, 1001 (2d Cir. 1992) (holding that State University of New York can subsidize New York Public Interest Research Group's on-campus activities with mandatory student fees).

Second, *Galda* is distinguishable from this case. *Galda* is explicitly limited to mandatory fees used to finance "an independent outside organization that espouses and actively promotes a political and ideological philosophy." *Galda*, 772 F.2d at 1064. The court noted that "there is a distinction between PIRG and student organizations . . . funded through the student activity fee" because the latter provided a forum for University students to engage in "the expression of differing views." *Id.* (quotations omitted)- By contrast, PIRG's purpose was not to provide students with a forum for expression but rather to advance a particular political agenda both on and off campus.

V.

In its final judgment, the district court held that the Eleventh Amendment, as interpreted by *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 88 (1988), barred it from considering plaintiffs' state-law claims for monetary relief. The district court was also "persuaded that these claims should be remanded rather than dismissed to avoid any limitations problems." The district court, therefore, remanded the state-law damages claims to state court.

Plaintiffs urge that the district court erred in finding that it lacked jurisdiction over the state-law claims. Defendants respond that 28 U.S.C. § 1447(d) bars this court from reviewing the district court's remand of plaintiffs' state-law claims. We find that § 1447(d) presents no bar to our review of the district court's final judgment, including its remand of the state-law claims. We also find, however, no error in the district court's remand of plaintiffs' state-law claims to state court.

28 U.S.C. § 1447(d) Provides, in relevant part, that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . .

." § 1447(d), however, does preclude all review of remand orders. Rather, § 1447(d) only bars review of remand orders authorized by 28 U.S.C. § 1447(c). *In Re Shell Oil Co.*, 932 F.2d 1518, 1521 (5th Cir. 1991). § 1447(c) Provides that "[i]f at any time *before final judgment* it appears that the district court lacks subject matter jurisdiction, the case shall be remanded" (emphasis added).

By its terms, the district court's remand in this case did not occur "before final judgment." Rather, the remand was part of the final judgment on the merits. Therefore, the remand was not authorized by § 1447(c) and is not covered by § 1447(d). *In re Carter*, 618 F.2d 1093, 1098-99 (5th Cir. 1980), *cert. denied sub nom. Sheet Metal Workers' Int'l Ass'n v. Carter*, 450 U.S. 949 (1981) (remand to state court after final judgment not authorized by § 1447(c) and therefore not covered by § 1447(d)). *See also* Joan Steinman, *Removal, Remand, and Review in Pendent Claim and Pendent Party Cases, 41 Vand. L. Rev.* 923, 1000-1002 (1988). § 1447(d) presents no bar to our consideration of the district court's remand order.

We also find no error in the remand of the state-law claims against defendants in their official capacities. In *Pennhurst*, the Supreme Court held that the Eleventh Amendment bars pendent statelaw claims from being brought in federal court against the state. The district court thus lacked jurisdiction to hear the state-law claims against defendants in their official capacity. It properly remanded these claims. *Carnegie-Mellon University v. Cohill*, 108 S.Ct. 614 (1988).

The Eleventh Amendment does not bar state-law actions against state officials in their individual capacity. *Scheuer v. Rhodes*, 416 U.S. 232, 237-38 (1974); *Spruyette v. Walters*, 753 F.2d 498, 512-13 (6th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986). Nonetheless, once the state-law claims against defendants in their official capacity had been remanded to state court, the district court properly remanded the same state-law individual-capacity claims as well. Under 28 U.S.C. § 1367(c)(4), the district court may decline to exercise supplemental jurisdiction over a claim if, "in

exceptional circumstances, there are . . . compelling reasons for declining jurisdiction."

We find such "exceptional circumstances" and "compelling reasons" here. Adjudicating state-law claims in federal court while identical claims are pending in state court would be a pointless waste of judicial resources. The district court's decision to dismiss the state-law claims entirely, rather than retain jurisdiction over the individual-capacity claims while the official-capacity claims were being adjudicated in state court, was within the court's discretion under 28 U.S.C. § 1367(c)(4),

VI.

Although we agree with plaintiffs that the university's antisolicitation policy as applied to newspapers with commercials violated plaintiffs' First Amendment right to free speech, we do not agree that defendants are liable for monetary damages or attorney's fees in their individual capacities. Defendants are protected from such a remedy by their qualified immunity as government officials.

A defense of qualified immunity can be overcome only if an objectively reasonable officer would know that his conduct was illegal given the facts available to him at the time of his action and the law that was clearly established at the time of the alleged illegal acts. *Anderson v. Creighton*, 107 S. Ct. 3034, 3039 (1987); *Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2738 (1982). The University's Operating Letter 9.05 became effective on January 15, 1988. Shortly before this date, similar University regulations had been upheld by a district court in this circuit. *Texas Review Society v. Cunningham*, 659 F.Supp. 1239 (1987).

The regulations upheld in *Texas Review Society* prohibited students at the University of Texas at Austin from handing out newspapers containing commercials in the area where student organizations maintained tables for distribution of literature. Such newspapers could be distributed only from unmanned newspaper racks. The district court held that these regulations were a narrowly tailored means of protecting the campus "from pollution by

commercial hawking and solicitation." *Texas Review Society*, 659 F.Supp. at 1245.

We express no opinion about whether *Texas Review Society* was correctly decided. However, the regulations upheld in *Texas Review Society* were sufficiently similar to the regulations at issue here that it cannot be said that defendants violated clearly established law at the time that they enforced the University's antisolicitation policy against the *Guardian*.

Therefore, defendants' defense of qualified immunity bars an award of monetary damages or attorney's fees against defendants in their individual capacity. *McNamara v. Moody*, 606 F.2d 621, 626-27 (5th Cir. 1979). Plaintiffs are entitled to prospective declaratory and injunctive relief barring the enforcement of the University's anti-solicitation policy to restrict the distribution of the *Guardian*. They may also be entitled to an award of attorneys' fees from the University. *Jackson* v. Galan, 868 F.2d 165, 168 (5th Cir. 1989).

AFFIRMED in part, REVERSED and REMANDED in part for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL NO. A-90-CA-203
HAYS COUNTY GUARDIAN, ET AL.
vs.
JEROME K. SUPPLE, ET AL.

FINAL JUDGMENT

In accordance with the Findings of Fact and Conclusions of law entered this date, the Court enters its final Judgment:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs' claims under the Sherman Act, the Texas Business and Commerce Act, the Texas Civil Practice and Remedies Code, and the Texas Constitution are hereby **REMANDED** to the 201st Judicial District Court of Travis County Texas.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiffs take nothing from Defendants on their remaining claims.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that costs be borne by the party incurring the same.

SIGNED this 26th day of February, 1991.

/s/ WALTER S. SMITH, JR.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL NO. A-90-CA-203

HAYS COUNTY GUARDIAN, ET AL.

vs.

JEROME K. SUPPLE, ET AL.,

AMENDED FINAL JUDGMENT

In accordance with the Findings of Fact and Conclusions of law previously entered by this Court, the Court enters its Final Judgment:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs' claims under the Texas Business and Commerce Act, the Texas Civil Practice and Remedies Code, and the Texas Constitution are hereby REMANDED to the 201st Judicial District Court of Travis County, Texas.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiffs take nothing from Defendants on their remaining claims. **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that costs be borne by the party incurring the same.

SIGNED this 20th day of March, 1991.

/s/ WALTER S. SMITH, JR.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL NO. A-90-CA-203

HAYS COUNTY GUARDIAN, ET AL.

vs.

JEROME K. SUPPLE, ET AL.,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for trial before the Court on December 18 through 19, 1990. The Court, having considered the testimony of the witnesses and all of the exhibits and evidence introduced, as well as the post-trial briefs presented by counsel, issues its Findings of Fact and Conclusions of Law.

I. INTRODUCTION

This action was originally filed in state court and was removed by the Defendants on March 14, 1990. The original defendants included Southwest Texas State University ("SWTSU") and the State University System Board of Regents; however, these Defendants were remanded because of the jurisdictional bar of the Eleventh Amendment. The remaining defendants are Jerome H. Supple, President of SWTSU; Tom Burdenski, Assistant Director of the Lyndon

Baines Johnson Memorial Student Center at SWTSU; Daniel N. Matheson, W. C. Perry, Lee Drain, G. W. Worth, Jr., Edmund Longcope, III, Daniel Ouellete, Jack L. Martin, Sheila Wheatley Clark, and Norman Dwight Elder, regents or former regents of the Texas State University System. These defendants have been sued in both their individual and official capacities.

Basically, the Plaintiffs complain that the Defendants have infringed upon their Constitutional rights by enacting and enforcing university regulations which restrict the *Hays County Guardian's* (the "*Guardian*") access to SWTSU. The regulations at issue require that newspapers such as the *Guardian* be distributed on campus only by use of newspaper racks placed in designated location or by mail subscription. Exempted from these regulations is the University *Star* (the "*Star*"), the newspaper published by the journalism students at SWTSU.

Plaintiffs Demaree, Dodd, and Ptak, officially registered students at SWTSU, further complain that their rights have been violated because they have been denied access to the *Guardian* and because they are forced to support the editorial policies of the star through a mandatory subscription extracted from their student service fees.

Plaintiffs assert claims under the First and Fourteenth Amendments to the United States Constitution, and Article I, § 8 of the Texas Constitution, based upon violations of free speech and free press. The Plaintiffs also claim these acts of the Defendants violate §§ 1, 2 and 15 of the Sherman Act, and § 15.21 of the Texas Business and Commerce Clause, because the alleged actions of the Defendants have resulted in economic injury to their business, and because the Defendants' actions represent an attempt to monopolize control over the newspaper market at SWTSU. Plaintiffs finally assert that the Defendants' actions constitute a violation of Article I, §§ 3 and 3a of Chapter 104 of the Texas Civil Practice and Remedies Code.

Plaintiffs seek a declaratory judgment that the Defendants' actions are illegal and unconstitutional. Plaintiffs also seek to enjoin the Defendants from denying

Plaintiffs equal access to the campus, as well as an award of nominal, compensatory, treble and punitive damages from each Defendant who acted in his or her individual capacity and from Defendants in their official capacities under Chapter 104 of the Texas Civil Practice and Remedies Code.

The Defendants assert that SWTSU is not a public forum, and that the regulations placed upon distribution of newspapers on the SWTSU campus are content-neutral and constitute reasonable time, place, and manner restrictions. Defendants allege that the regulations are necessary to "prevent disruption of the academic mission of the University." The Defendants assert that the *Star* is not subject to editorial control by the University and that it is exempt from the regulations in order to give the journalism students a full opportunity to learn the business of publishing a newspaper.

II. FINDINGS OF FACT

A. The parties have stipulated to the following findings of fact:

1. Plaintiffs *Hays County Guardian*, Jeffrey Stefanoff, Vicki Hartin, Webb Branen, Joe Gaddy, Robert Martinez, and John Demaree (the "newspaper plaintiffs") cooperatively own and publish the *Hays County Guardian* (the "*Guardian*"), an independent newspaper concerned with "environmental and peace and social justice issues."

2. Plaintiffs John Demaree, Jody Dodd and Joe Ptak (the "student plaintiffs") are students registered at SWTSU.

3. The *Guardian* is not sold, but rather is given away without charge. It does contain certain commercial advertising to cover its costs.

4. SWTSU is a co-educational institution of higher education located in San Marcos, Texas.

5. SWTSU is situated on a large urban campus and provides educational training, living facilities and other services to approximately 22,000 students.

6. SWTSU employs approximately an equal

number of faculty and staff.

7. SWTSU commits itself to contribute to the greater body of knowledge in specific disciplines through research, scholarship, and creative expression.

8. SWTSU believes that the primary purpose of higher education is to promote learning and stimulate inquiry for truth in an atmosphere of freedom.

9. Accordingly, SWTSU encourages students to exercise the rights of citizenship.

10. The SWTSU community represents a large percentage of the *Guardian's* readership.

11. The Texas State University System Board of Regents ("Board of Regents") is the state agency exercising management and control over Texas State University meember institutions, including SWTSU.

12. The university rules at issue in this suit were generally promulgated by the Board of Regents and are cnforced by SWTSU officials.

13. The Board of Regents' rules and university policies are set forth in Rules and Regulations of the Board of Regents, Texas State University System, and in "Operating Letters" ("OL's").

14. The decision to enact a proposed OL is made by the President's Cabinet and the President.

15. Prior to October 10, 1989, the *Guardian* was circulated at various locations on the SWTSU campus, including academic departments, the student center, and the campus expression area (the "Quad Area").

16. On or about October 10, 1989, the *Guardian* received a letter from Defendant Burdenski which stated:

> Newspapers may be circulated on campus in one of two ways: First, by providing a covered newspaper stand and placing it along side the other newspaper racks at the LBJ Student Center, the bus shelter at Evans Field, Harris Dining Hall on WeSt

> Campus, or the SWT Bookstore. Second, through a subscription arranged by the university department in advance and distributed by direct delivery or through U.S. mail.

The letter then directed the *Guardian* that it "either need[ed] to provide a rack at one of the approved locations, or arrange delivery by subscription to the department wishing to receive" the newspaper in order to continue distributing the newspaper on campus.

17. The newspaper rack locations were selected by Defendants Lillian Dees and John Garrison.

18. In deciding to restrict circulation of the *Guardian*, Mr. Burdenski relied upon the following rules, policies, or regulations:

a. SWT/OL No. 09.05
Effective Date: January 15, 1988
Status: Still in effect

b. Rules and Regulations of the Board of Regents,
Texas State University System
Adopted: September 1, 1980
Amended: May 26, 1989
Status: Still in effect

c. SWT/OL No. 09.06
Effective Date: May 3, 1989
Status: Still in effect

d. SWT/OL No. 09.20
Effective Date: May 20, 1985
Revised: August 1, 1988
Status: Still in effect

e. SWT/OL No. 09.03

Effective Date:
March 26, 1985
Deleted: June 1, 1989

19. These policies, rules, or regulations pertain to the following terms:

a. Commercial newspaper -- a newspaper other than a university-owned publication that is sold or distributed for commercial purpose.

b. Non-commercial newspaper -- a newspaper distributed free of charge and that contains no commercial advertisements.

c. Solicitation (commercial advertising) -- the sale or offer for sale of any property or service, whether for immediate or future delivery, and the receipt of or requests for any gift or contribution.

d. Impermissible solicitation -- solicitation that violates the Regents' solicitation policies and rules. The sale or offer for sale of any newspaper, magazine, or other publication by means of a vending machine or distribution stand in an area designated in advance by [university officials] for the conduct of such activity is not impermissible solicitation.

20. This letter was published by the *Guardian* in its October 19 - November 1, 1989 issue.

21. Plaintiffs had been distributing their newspaper, throughout campus, by various means including hand-to-hand delivery or leaving them in unattended stacks or boxes.

21. In a second letter addressed to the *Guardian*, dated November 27, 1989, Mr. Burdenski wrote that "University regulations require that newspapers be distributed

either through a covered newspaper rack in an approved location or through a prior arranged subscription. Newspapers may not be handed out to passers-by in the quad area or anywhere else on campus." Legal action was threatened if the paper failed to comply.

22. The newspaper plaintiffs are not willing to subject themselves to arrest or other potential criminal sanctions in order to distribute the newspaper on campus.

23. The *Star* is owned and operated by SWTSU. It is an academic laboratory for journalism students as well as a means of expression for students, faculty and staff.

24. The *Star* is funded through student services fees and advertising revenues.

25. The *Star* is distributed by racks in 40 locations throughout the campus.

26. Distribution locations for the *Star* were selected by the paper's circulation staff, journalism department officials and the Dean of Students.

27. The locations were selected to serve the needs of the students and university interests.

28. The *Guardian* and other publications are limited to five campus distribution sites and distribution by mail.[1]

29. Distribution of the *Star* is not restricted in the ways set out in the letters of Defendant Burdenski to the *Guardian*, and, conversely, the Defendants have placed more restrictions on distribution of the *Guardian* than the *Star*.

30. The *Star* competes for and publishes commercial advertising identical to the advertising found within the *Guardian*.

31. Less than 15% of the *Star's* operating budget is derived from student fees.

32. The remainder of the *Star's* operating budget is obtained through solicitation and sale of commercial advertisements in direct competition with the Plaintiffs and

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[1]At trial, the testimony revealed that three additional locations had been added.

other similarly situated newspaper publishers.

33. The *Star* also carries national advertising in the form of a monthly national campus newspaper insert.

34. Like the *Guardian*, the *Star* also takes stands or positions on world, national, state, local, and university matters.

35. As a small, independent newspaper, the *Guardian* had worked hard through consistent and reliable publication to develop readership and advertising. The SWTSU campus represented a large percentage of the *Guardian's* readers.

36. Plaintiffs John Demaree, Jody Dodd, and Joe Ptak are officially registered students at SWTSU.

37. Plaintiff Demaree is also on the staff of the *Guardian*.

38. Plaintiffs Dodd and Ptak have not been affiliated in any way with the *Guardian*, other than being loyal readers.

39. The *Guardian* does not demand any particular method of distribution.

40. As a result of Defendants' actions, Plaintiffs have been forced to retain counsel to represent them in this matter.

B. From the evidence introduced at trial, the Court makes the additional findings of fact.

1. The Board of Regents of the Texas State University System have enacted rules prohibiting "solicitation" on the campuses comprising the Texas State University System. These regulations define "solicitation" as

> the sale or offer for sale of any property or service, whether for immediate or future delivery, and the receipt of or request for any gift or contribution.

Regent's Rules Chapter VII, Sec. 3.1. Certain activities are not considered solicitation, including:

> The sale or offer for sale of any newspaper, magazine, or other publication by means of a vending machine or distribution stand in an area designated in advance by the President or a designated appointee for the conduct of such activity.

Regent's Rules Chapter VII, Sec. 3.111. Also exempted are advertisements sent to students, faculty or staff through the United States mail. Regent's Rules Chapter VII, Sec. 3.11(14).

2. Pursuant to these rules, the administration at SWTSU has enacted similar policies regarding the SWTSU campus. The SWTSU regulations include the same definition of solicitation and the same exemption for newspapers sold through vending machines. SWT/OL No. 09.05, Secs. 2.01, 2.02(a).

3. Pursuant to university regulations, solicitation is restricted so that it will not:

a. Interfere with academic or other institutional programs that are being carried on in campus facilities;
b. Interfere with the free and unimpeded flow of vehicular or pedestrian traffic on sidewalks and streets and at places of ingress and egress to and from campus buildings;
c. Use obscene or libelous language or materials;
d. Harass, embarrass, or intimidate the person or persons being solicited;
e. Advocate the deliberate violation of a federal or state law or a published University policy;
f. Constitute disorderly conduct, disrupt classroom discussion, impede maintenance of public order, or constitute a danger to the person distributing or disseminating material or to any other individual or group; or

g. Litter the campus grounds.

3.[sic] The Board of Regent regulations further provide that distribution of petitions, handbills, etc. is permissible, but subject to "[r]easonable and nondiscriminatory rules and regulations as to time, place, and manner." Regent's Rules Chapter VII, Sec. 3.2. The SWTSU regulations provide that petitions, handbills or other literature may be distributed by students or organizations, so long as the requirements of SWT/OL No. 09.05 regarding solicitation on campus are followed. SWT/OL No. 09.06.

4. It was based upon the foregoing rules that Burdenski informed the *Guardian* that copies of the newspaper could not be handed out, but must be placed in newspaper vending racks.

5. The administration at SWTSU has created a "campus expression area" where "within the regulations specified [by the administration], all persons may express themselves on any topic and enjoy their rights of free speech and assembly guaranteed under the First and Fourteenth Amendments of the Constitution of the United States." SWT/OL No. 09.20, Effective Date 6/4/81, Joint Exhibit #4. The use of the campus expression area is subject to compliance with SWT/OL No. 09.05, regarding solicitation on campus.

6. These regulations were enforced against not only the *Guardian*, but also against other organizations which attempted to distribute their publications other than through vending racks at designated locations or through mail subscriptions. Letters were mailed to publications as diverse as *The Houston Post*, *The Pelebian*, *The Houston Chronicle*, *The Austin Chronicle*, *Take 5 Magazine*, *America*, and *The SWT Press*.

7. The *Guardian* was distributed free of charge, with its publication costs defrayed through advertising revenues. Approximately 90% of the issues were distributed in Hays County, while approximately one-third were distributed at SWTSU.

8. The *Guardian* was passed out by hand rather

than through racks or boxes because of advice received from other journalists about creating a "mystique" -- a product would be in greater demand if it was harder to get.

9. After receiving Burdenski's letter, the *Guardian* failed to comply with the University regulations, according to Plaintiff Stefanoff, because it was felt the *Guardian* was being singled out for such harsh treatment.

10. After Burdenski's letter was published in the *Guardian's* 18th issue, advertising revenue dramatically decreased.

11. The Plaintiffs halted publication of the *Guardian* after Burdenski's second letter not because they feared legal action, but because the advertising revenue had dried up.

12. If the Plaintiffs are allowed to distribute the *Guardian* by hand on the SWTSU campus, they will resume publication.

13. While the *Star* also accepts advertisements, the revenue generated goes back into production of the newspaper and into scholarships for students.

14. Defendants have not restricted student access to the *Guardian* and the ideas and information contained therein without justification.

15. Restricting distribution of the *Guardian* promotes the following interests:

(a) Preserving an academic atmosphere;
(b) maintaining security and safety for persons and property on campus;
(c) protecting the Privacy of students, faculty, and staff;
(d) controlling pedestrian and vehicular traffic;
(e) protecting persons on campus from crime and unlawful activities;
(f) preserving the beauty of the campus , buildings, and facilities;
(g) maintaining the campus, buildings, and facilities in a clean, orderly, and appealing appearance and avoiding unnecessary wear and

tear on buildings, grounds and facilities;

(h) preserving the architectural lines of university buildings;

(i) protecting students faculty and staff from deception, fraud, and commercial exploitation; and

(j) eliminating unnecessary costs and waste of university resources.

16. The SWTSU campus is not a public forum. It has not been designated as such, nor is it a traditional or public forum although there is a free speech area on campus.

17. The restrictions upon solicitation and newspaper vending promulgated by the Board of Regents and the SWTSU administration, and enforced at SWTSU, were not based upon the content of the *Guardian* or of any other publication.

18. The time, place and manner restrictions imposed by the Board of Regents and SWTSU regulations are reasonable and narrowly tailored to serve a significant governmental interest, that is, maintenance of an appropriate educational environment and education of not just journalism students with respect to publication of a newspaper.

19. Defendants' actions do not constitute a compulsory scheme by which the Board of Regents and/or SWTSU require SWTSU students to finance political and ideological activities with which they disagree.

20. The Defendants do not exercise editorial control over the *Star*.

21. Defendants' actions have not restrained, monopolized, or denied Plaintiffs' equal access to the SWTSU campus to distribute the *Guardian*.

22. The Plaintiffs are currently free to publish and distribute their newspaper.

23. There are sufficient alternative means of distribution of the newspaper including through vending machines, mailing and subscriptions.

24. Plaintiffs Dodd and Ptak failed to establish that the actions of the Defendants were the cause of their no

longer being able to read and enjoy the *Guardian*.

25. Defendants have not agreed, contracted, or conspired to restrain trade in newspapers in interstate and intrastate commerce on the SWTSU campus.

26. Defendants' acts do not constitute conspiracy or an attempt to monopolize trade in newspapers in interstate and intrastate commerce, or to exercise monopoly control over the newspaper market on the SWTSU campus.

27. There is no connection between the monetary damages suffered by the Plaintiffs and the actions of the Defendant.

28. Any of the above findings of fact which should more properly be considered a conclusion of law is hereby deemed as such.

III. CONCLUSIONS OF LAW

A. Eleventh Amendment Sovereign Immunity. The Eleventh Amendment prohibits a citizen from bringing suit in federal court against his own state. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 88, 104 S.Ct. 900 (1984). A state may be sued only to the extent that it consents to be sued. *Id.* "This jurisdictional bar applies regardless of the nature of the relief sought." *Id.* at 908. The doctrine of sovereign immunity bars suit not only against a state, but likewise against state officials when "the state is the real, substantial party in interest." *Ford Motor Co. v. Dept. of Treasury of Indiana*, 323 U.S. 459, 464 (1945). Relief sought nominally against a state official is a suit against the sovereign if the judgment awarded would operate against the state. *Pennhurst State School & Hospital v. Halderman*, 104 S.Ct. at 909. Such recovery is barred regardless of whether it is for damages or injunctive relief. *Id.* However, "a suit challenging the constitutionality of a State official's action is not one against the State." *Id.*

An additional exception applies when a suit is based upon the actions of a state officer who is acting in his official capacity "but without any statutory authority." *Id.* at 915, *quoting Florida Dept. of State v. Treasure Salvors, Inc.*, 458

U.S. 670 (1982). This "ultra vires" doctrine has no application in the present case because there was no evidence presented to the Court that the Defendants were acting beyond their official authority.

Nor does the doctrine of pendent jurisdiction permit a federal court to contravene the language of the Eleventh Amendment. "[N]either pendent jurisdiction nor any other basis of jurisdiction may over ride the Eleventh Amendment." *Id.* at 919. *Pennhurst* clearly provides that "a suit against state officers for retroactive monetary relief, *whether based on federal or state law*, must be brought in state court." *Id.* (emphasis added). Accordingly, the Court is without jurisdiction to consider those claims brought by the Plaintiffs which seek an award of monetary damages.

As this case was originally brought in state court, the Court is persuaded that these claims should be remanded rather than dismissed to avoid any limitations problems. Accordingly, it is **ORDERED** that Plaintiffs' claims under the Sherman Act, the Texas Business and Commerce Act, the Texas Civil Practice and Remedies Code, and the Texas Constitution are hereby REMANDED to the 201st Judicial District Court of Travis County Texas.

B. Qualified Immunity. The Defendants have asserted that they are entitled to qualified immunity as to those claims brought against them in their individual capacities. The general rule is that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The contours of the right must be of such sufficient clarity that a reasonable official would understand that his actions violate that right. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Having considered the testimony and evidence presented, the Court is persuaded that the Defendants are entitled to qualified immunity from damages in their individual capacities.

The regulations passed and the enforcement of those regulations were consistent with First Amendment authority. The regulations are facially content neutral and there is nothing before the Court to indicate that the content of Plaintiffs' publication had anything to do with the Defendants' enforcement of those regulations.

Additionally, although there is numerous case authority regarding the parameters of First Amendment rights (all of which has been presented extensively by the Plaintiffs), the Court has been unable to find any authority that clearly prohibits a state university from giving the university's own newspaper more favored treatment than that afforded outside periodicals.

The burden is upon the Plaintiffs to overcome the Defendants' defense of qualified immunity. *Saldana v. Garza*, 684 F.2d 1159, 1163 (5th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983). Plaintiffs have failed to meet this burden. Because of the foregoing, the Court is persuaded that the Defendants are entitled to qualified immunity from civil damages under S 1983. Accordingly, it is **ORDERED** that Plaintiffs take nothing from Defendants on their claims for individual damages arising under § 1983.

C. Sherman Act Claims. To the extent that any claims for injunctive or declaratory relief remain under the Sherman Act, the Court is persuaded that such claims are precluded. The Courts have determined that "Congress did not intend the Sherman Act to apply to the states." *Limeco, Inc. v. Division of Lime of the Miss. Dept. of Agriculture & Commerce*, 778 F.2d 1086, 1087 (5th Cir. 1985), *citing Parker v. Brown*, 317 U.S. 341 (1943). In the *Limeco* case, the Fifth Circuit expressly refused to create an exception to this doctrine when a state acts as a competitor in a commercial activity. Accordingly, it is **ORDERED** that the Plaintiffs take nothing from Defendants on their claims for injunctive and/or declaratory relief under the Sherman Act.

D. State Anti-Trust Claims. To the extent that any claims for injunctive or declaratory relief remain under the

state antitrust statutes, the Court is persuaded that these claims are likewise precluded. As the Texas statutes are generally construed in line with federal law, the state action exemption should similarly apply to an anti-trust claim under Texas law. Additionally, the law recognizes that a company cannot conspire with its own employees. *See Red Wing Shoe Co. v. Shearer's, Inc.*, 769 S.W. 2d 339, 344 (Tex. App. -- Houston [1st Dist.] 1989, no writ). This "intracorporate conspiracy doctrine" applies in the present case because all of the Defendants are state officials and because the *Star* is a state university publication. There was, additionally, no evidence presented by the Plaintiffs to support an antitrust cause of action. Accordingly, it is **ORDERED** that Plaintiffs take nothing from Defendants on their claim for declaratory and/or injunctive relief arising out of the state anti-trust act.

E. First Amendment. The Plaintiffs complain that the actions of the Defendants violated their rights of free speech and freedom of the press under the First and Fourteenth Amendments to the U.S. constitution.

The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." The First Amendment is binding on the states through application of the Fourteenth Amendment. *Healy v. James*, 408 U.S. 169, 171 (1972). Despite the broad protection afforded, the First Amendment "does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l. Soc. for Krishna Consc.*, 452 U.S. 640, 647 (1980).

> Although the First Amendment prohibits a state from abridging freedom of speech, the Amendment does not prohibit all regulation of expressive activities. Likewise, although the distribution of a newspaper is protected by the free press and speech provisions of the First Amendment, . . . the Amendment does not prohibit all regulation of distribution.

Texas Review Society v. Cunningham, 659 F. Supp. 1239, 1244 (W.D. Tex. 1987). Activities protected under the First Amendment are subject to reasonable time, place, and manner restrictions. *Id.*

The extent of permissible regulation depends upon the place to be regulated. "[C]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Heffron v. Int'l. Soc. for Krishna Consc.*, 452 U.S. at 650-651. "The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 44 (1983). These forums are classified as: (1) places traditionally open to the public; (2) places which the government has opened for use by the public as a place for expressive activity; and (3) public property which is not by tradition or designation a forum for public communication. *Id.* at 45-46.

Places traditionally open to the public consist of streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* at 45, *quoting, Hague v. CIO*, 307 U.S. 496, 515 (1939). In such traditional public forums, the government may not prohibit all communicative activity, but

> [w]e have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for

communication of the information.

Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976).

In situations involving forums that have been opened for use by the public, the State is bound by the same standards that apply in a traditional public forum. *See Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45-46 (1983); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

In the case of public property which is not by tradition or designation a forum for public communication, a different standard prevails. In addition to regulations as to time, place and manner, the State "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. at 46. As the Court has noted on several occasions, ""[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."" *United States Postal Service v. Council of Greenburgh Civic Assn.*, 453 U.S. 114. 129 (1981), *quoting Greer v. Spock*, 421 U.S. 828, 836 (1976), *in turn quoting, Adderley v. Florida*, 385 U.S. 39, 47 (1966). Property which is publicly owned or operated does not become a "public forum" merely because members of the public are permitted to come and go at will. *United States v. Grace*, 461 U.S. 175, 178 (1983). And "[t]here is little doubt that in some circumstances the government may ban the entry on to public property that is not a 'public forum' of all persons except those who have legitimate business on the premises." *Id.*

The Supreme Court has recognized that the campus of a public university, "at least for its students, possesses many of the characteristics of a public forum." *Widmar v. Vincent*, 454 U.S. 263, 267 n. 5 (1981).

> At the same time, however,our cases have recognized that First Amendment rights must be analyzed "in light of the special characteristics of the school environment." *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969). We continue to adhere to that view. A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and non-students alike, or that a university must grant free access to all of its grounds or buildings.

Id. at 268 n. 5. "[N]owhere [have we] suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for ... unlimited expressive purposes." *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. at 44, *quoting Grayned v. City of Rockford*, 408 U.S. 104, 117-18 (1972).

In addition to analyzing the type of forum involved, the Court must also determine whether the regulation at issue is directed at the content of the expressive behavior which it is attempting to regulate.

> For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Carey v. Brown*, 447 U.S. 455, 461, 100 S.Ct. 2286, 2290,

> 65 L.Ed.2d 263 (1980). The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 at 771 (1976).

There is no evidence before the Court that either the Board of Regents or the administration at SWTSU has permitted access to SWTSU to such a degree that it has converted the campus into a "public forum." "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 802 (1985). Solicitation on campus is allowed only pursuant to the Board of Regent rules and SWTSU Operating Letters. Newspapers which contain commercial advertisements are considered solicitation and are allowed to be distributed on campus only if they are placed in racks in designated locations. Therefore, the Court need only consider whether the restrictions imposed are reasonable and compatible with the university's ultimate mission (education), and that they are not an attempt to suppress expression because of opposition to the speaker's view. The evidence before the Court clearly establishes that this is the case. The Defendants contend that the University enacted the regulations at issue to protect the following interests, including:

1. Preserving an academic atmosphere;
2. Maintaining security and safety for persons and property on campus;

3. protecting the privacy of students, faculty, and staff;
4. Controlling pedestrian and vehicular traffic;
5. Protecting persons on campus from crime and preventing unlawful activities on campus;
6. Preserving the beauty of the University's campus, buildings and facilities;
7. Maintaining the campus, buildings, and facilities in a clean, orderly and appealing appearance and avoiding unnecessary wear and tear on buildings, grounds and facilities;
8. Preserving the architectural lines of important and historic university buildings;
9. Protecting students, faculty and staff from deception, fraud and commercial exploitation; and
10. Eliminating unnecessary costs and waste of university resources. These are clearly important considerations in light of the educational purpose of the university.

Additionally, there is nothing in either the regulations or the actions of the Defendants to indicate that enforcement was related to the content of the publications. As previously noted, a number of other publications were also informed of the university regulations. Nor does the failure to include the *Star* within these regulations make their purpose unreasonable or indicate any sort of content-based restriction. The *Star* is published as a laboratory exercise for journalism students and is an integral part of the education process. While the *Star* accepts advertisements, the revenues generated are put back into the paper or into scholarships for students. The restrictions imposed are, therefore, reasonable.

Even were the Court to determine that SWTSU is a public forum, the outcome would be the same. As previously noted, when a public forum is involved, the restriction on speech must be content neutral, narrowly tailored to serve a significant governmental interest, and leave open ample

alternative channels for communication. However, the First Amendment rights at issue must still be viewed "in light of the special characteristics of the school environment." *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).

"A major criterion for a valid time, place, and manner restriction is that the restriction 'may not be based upon either the content or subject matter of speech.'" *Heffron v. Int'l. Soc. for Krishna Consc.*, 452 U.S. at 648, *quoting Consolidated Edison Co. v. Public Service Commn.*, 447 U.S. 530, 536 (1980). Plaintiffs argue that the regulation at issue is content based because it gives preferential treatment to the *Star*--a publication that reflects the University's own viewpoint. However, as previously noted, a reading of the regulations at issue establishes that, on their face, the regulations are applied regardless of the content of the publication. The evidence presented establishes that a number of other publications were admonished about proper distribution as well as the *Guardian*.

Additionally, ample alternative channels for communication remain. If a publisher does not wish to distribute his publication through vending machines, he may distribute them through direct mailings, subscriptions or by distributing them off campus. Also, the Plaintiffs could distribute their newspaper without restriction if it were not sold for profit and if all commercial advertisements were removed.

Further, the regulations are narrowly tailored to serve "a significant governmental interest." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U,S. at 771. They do not prohibit newspapers on campus, only the means in which they are distributed. The interests identified by the Defendants addressing the "safety and convenience" of the students at SWTSU and "maintaining the educational atmosphere" on the SWTSU campus certainly constitute valid governmental objectives. *Texas Review Soc. v. Cunningham*, 659 F.Supp. at 1246 (W.D. Tex. 1987). "As a general matter, it is clear that a State's interest in protecting the 'safety and convenience' of persons using a public forum is a valid

governmental objective." *Heffron v. Int'l. Soc. for Krishna Consc.*, 452 U.S. at 651, *quoting Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972). Considering the valid governmental objective of protecting the safety and convenience of persons using a public forum along with the special objective of maintaining the educational environment on the university campus, the Court is persuaded that the regulations are narrowly tailored to promote a significant government interest. The exemption of the *Star* from these regulations does not effect the significance of the governmental interest. As noted in *Perry* and *Widmar*, a university is not required to offer the same freedom of access to non-students as is afforded students, faculty and staff, nor is it required to provide nonstudents unlimited access to its facilities. The wider distribution afforded the *Star* promotes the primary purpose of the University education by giving journalism students who publish it the broadest possible exposure to all stages involved in the production of a newspaper, including distribution.

While Plaintiffs argue that the same objectives could be achieved by less restrictive measures, the "narrowly tailored" standard identified by the Supreme Court has not been "interpreted to require elimination of all less restrictive alternatives." *Bd. of Trustees of State Univ. of N.Y. v. Fox*, ___ U.S. ___, 109 S.Ct. 3028, 3033 (1989), referencing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984); *Regan v. Time, Inc.*, 468 U.S. 641, 657 (1984).

Plaintiffs further argue that the regulations are not reasonably related to the stated governmental interests because they do not prohibit the distribution of commercial items, such as candy bars and soft drinks, through vending machines or other devices. This analogy is inapposite because the distribution of such products does not implicate freedom of speech. *See City of Lakewood v. Plain Dealer Pub. Co.*, ____ U.S.____, 108 S.Ct. 2138, 2146 (1988).

Plaintiffs cite the *Plain Dealer* case as support for their argument that the regulations at issue give the administration "unbridled" authority to determine the placement of newspaper racks. The present case differs from that in the

Plain Dealer in a number of instances. First, there is no annual or periodic renewal of licenses in order to place a newspaper rack on the campus. Newspaper racks are permitted so long as they are placed in approved locations. Second, the regulations regarding solicitation apply to *all* solicitation on campus, not just to newspapers.

Plaintiffs next assert that the regulations are invalid as an impermissible restriction on commercial speech. The Court is not persuaded that the regulations impinge upon any commercial speech. Commercial speech has been identified as that which proposes a commercial transaction, and is different from speech for profit such as embodied in a newspaper. *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 109 S.Ct. at 3036. However, even under the less restrictive commercial speech analysis, the Plaintiffs' claims fail. The Supreme Court has identified a four-pronged test for determining whether a particular regulation impinges upon commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve the interest.

Central Hudson Gas and Electric Corp. v. Public Service

Commission, 447 U.S. 557, 566 (1980). The Court has already determined that the University has identified a substantial governmental interest, and that the regulations advance those interests and are no more extensive than necessary to serve those interests. Additionally, the regulations at issue are not directed at the advertising contained in the newspaper, but rather at any form of solicitation on the University campus.

In light of the foregoing, it is **ORDERED** that Plaintiffs take nothing against the Defendants on their claims under the First and Fourteenth Amendments.

F. Mandatory Subscriptions. The student Plaintiffs assert that their constitutional rights have been violated because they are assessed mandatory student service fees which are used to support the *Star*, which they allege espouses editorial policies and practices with which they do not agree. The Supreme Court has recognized that in certain situations an organization may not constitutionally require its members to contribute to causes which they oppose. *See Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *International Association of Machinists v. Street*, 367 U.S. 740 (1961). The *Abood* court determined the "compulsory subsidization of ideological activity" cannot be forced upon those who object to it. *Abood v. Detroit Board of Education*, 431 U.S. at 237. The *Abood* court's holding has been extended to the university setting by the Third Circuit. *Galda v. Rutgers*, 772 F.2d 1060 (3rd Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986). The *Galda* court held that a state university could not compel students to pay to support an independent outside organization that advocated political and ideological philosophies with which many students did not agree. *Galda* did not deal, however, with a situation in which mandatory student services fees were used to support university programs.

A case directly on point from the Pourth Circuit controls the disposition of Plaintiffs' claims. *See Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983). In the *Kania* case, students at the University of North Carolina at Chapel Hill

filed suit complaining that their Fourteenth Amendment rights were violated by the university's use of student service fees to subsidize the university newspaper, *The Daily Tar Heel*, which espoused editorial views with which they disagreed. As in the instant case, the university newspaper was a product of the school of journalism and was distributed on campus with charge. The Circuit Court determined that the funding of the newspaper through mandatory student fees was "the least restrictive means of accomplishing an important part of the University's central purpose, the education of its students." *Id.* at 480. The reasoning in *Kania* controls the disposition of this case.

The *Star* is vitally important to SWTSU's primary mission, which, once again, is the education of its students. Additionally, while the newspaper may publish editorial opinions with which some students may not agree, there is no evidence before the Court that those opinions are mandated by the administration at SWTSU or by the Board of Regents.

Accordingly, it is **ORDERED** that the Plaintiffs take nothing from Defendants on their claims related to mandatory student fees.

Any of the foregoing conclusions of law that should properly be considered a finding of fact is hereby deemed as such.

Any further relief not expressly granted herein is hereby **DENIED.**

SIGNED this 26th day of February, 1991.

/s/ WALTER S. SMITH, JR.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX E

Memo To :	All SWT/OL Holders	SWT/OL No. 09.05 Issue No. 5
Subject:	Solicitation on Campus*	Effective Date: 01/15/88

Reviewer: Dean of Students
Review Cycle: December, E4Y

INDEXING TERMS FOR THIS OL
Booths
Solicitation

1. PURPOSE
   1.01 The purpose of this operating letter is to establish a policy concerning solicitation activities on campus.
   1.02 This OL does not govern political activities, which are governed by SWT/OL No. 09.03, "Political Activities on Campus."

2. SOLICITATION POLICY
   2.01 As used in this OL, the word "solicitation" means the sale or offer for sale of any property or service, whether for immediate or future delivery, and the receipt of or request for any gift or contribution. The solicitation of gifts or contributions to support political candidates or issues, or the solicitation of votes, or signatures for petitions or other documents of a political nature are governed by SWT/OL No. 09.03, "Political Activities on Campus." Persons desiring to conduct solicitation activities on campus must complete a solicitation request form in the Office of Student Center Services.

2.02 Solicitation which may be conducted within the boundaries of the University campus includes the following:

* NOTE This OL was formerly named "Solicitation and the Distribution of Signs on Campus." The solicitation information is included in this SWT/OL 09.05, Issue No. 5; the information on distribution of signs is now in SWT/OL 09.06.

a. The sale or offer for sale of any newspaper, magazine, or other publication by means of a vending machine or distribution stand in an area designated in advance by the Dean of Students (or designee) £or the conduct of such activity.

b. The sale or offer for sale of any food or drink item by means of vending machines owned and operated by the University or its subcontractor in an area designated in advance by the Dean of Students (or designee) for the conduct of such activity. All vendors/ caterers must be approved by the University and must submit evidences of insurance ($500,000 limit) and commission for use of facilities on sales to non-University entities. This approval procedure is outlined in SWT/OL 14.03, "Catered Events."

c. The sale or offer for sale of any publication of the University, or of any book or other printed material to be used in the regular academic work of the University.

d. The operation by the University or its subcontractor of any bookstore, specialty store, laundry, cafeteria, or

other service facility maintained for the convenience of the students, faculty and/or staff.

e. The sale or offer for sale by the University or its subcontractor of food and drink items, souvenirs, tickets and programs at athletic contests or at any program or event sponsored or authorized by the University.

f. The advertisement of any activity, item, or product sponsored or authorized by the University and approved by the Dean of Students (or designee).

g. The collection of tuition and fees in connection with enrollment of a student in any course or degree program.

h. The collection of membership fees or dues by registered student, faculty, or staff organizations at meetings of such organizations scheduled in accordance with the facilities use regulations of the University.

i. The collection of admission fees or contributions for the exhibition of movies or other programs, including but not limited to fine arts and athletic events that are sponsored by the University, or by a registered student organization or faculty organization and which are authorized and scheduled in accordance with the facilities use regulations of the University.

j. Activities that are sponsored by a registered student, faculty, or staff organization on behalf of a charitable organization and which are conducted in accordance with nondiscriminatory policies approved by the Dean of Students (or designee) and scheduled in

accordance with the facilities use regulations of the University.

k. The activities that are sponsored by a registered student organization or the University and which are authorized and scheduled in accordance with the facilities use regulations of the University as long as all aspects of the activity clearly identify the organization sponsoring the event on all signs, tickets or literature. The University may, at its discretion, require that solicitation be conducted directly by the student organization and may impose restrictions that would prevent student organizations from using non-members to solicit for the organization.

l. Activities of agents of companies authorized as requested by the University to provide information or services related to instruments, equipment, office supplies, health insurance, optional retirement programs, or tax-sheltered annuities and other University-related services specifically requested by the University.

m. The advertisement of any activity, item, service or product in any University publication.

n. The advertisement of any activity, item, service, or product sent to University students, faculty, or staff through the United States mail.

o. The posting by individual students, faculty, and staff members of advertisements for residential leases and notices offering to sell personal property outside the course of ordinary business. All such posting on bulletin

boards designated for such purposes by the Dean of Students (or designee) is allowable, provided that all advertisements and notices must conform to the requirements and limitations set forth in this OL. Posting must also conform to the policies and procedures established in SWT/OL No. 09.06, "Posting/Distribution of Signs on Campus."

2.03 Permissible solicitation must be conducted in a manner that will not:

a. Interfere with academic or other institutional programs that are being carried on in campus facilities.

b. Interfere with the free and unimpeded flow of vehicular or pedestrian traffic on sidewalks and streets and at places of ingress and egress to and from campus buildings;

c. Use obscene or libelous language or materials;

d. Harass, embarrass, or intimidate the person or persons being solicited;

e. Advocate the deliberate violation of a federal or state law or a published University policy;

f. Constitute disorderly conduct, disrupt classroom discussion, impede maintenance of public order, or constitute a danger to the person distributing or disseminating material or to any other individual or group; or

g. Litter the campus grounds.

2.04 All food and beverage handlers must possess valid health permits when required by law.

2.05 Any solicitation activity planned for a residence hall must also be approved by the Director of Residence Life (or designee).

2.06 If after a reasonable investigation, the Dean of Students (or designee) determines that a student or organization is soliciting in violation of this OL, he shall order the violator to cease, and he may refer the matter to the Director of Student Justice for action under the Code of Student Conduct.

2.07 Within thirty days after the end of each semester or summer session, each person or organization receiving permission to solicit during the preceding semester or summer session shall file with the Director of the Student Center (or designee) a statement fully disclosing the following:

a. The amount of money received from solicitations;
b. The sources of money received from solicitations;
c. The expenditures made from funds raised by solicitations; and
d. The beneficiaries of funds expended from solicitations.

Any person or organization failing to comply with the provisions of this section shall be prohibited from further solicitations until compliance is made.

3. BOOTHS

3.01 "Booth" means a table temporarily installed for the purposes of engaging in solicitation.

3.02 Booths may be allowed only in the Campus Expression Area, the LBJ Memorial Student

Center, or, in the case of special activities, at other locations as designated solely within the discretion of the Dean of Students (or designee). Booths maintained for political activities must be located in the Campus Expression Area and must be maintained in accordance with SWT/OL No. 09.03, "Political Activities on Campus."

3.03 Activities in all booths must be conducted in a manner consistent with section 2.03 above, and, in addition, must meet the following requirements:

a. Each booth must meet fire and safety standards;

b. No booth may be installed and maintained for more than five consecutive calendar days;

c. Booths must be staffed by members of the sponsoring organization or department.

4. EXCEPTIONS AND APPEALS

4.01 The Dean of Students has the authority to grant exceptions or variances to the provisions of the OL to meet the exigencies of unusual circumstances. No person or organization may conduct any of the activities governed by this OL in variance to the policies stated herein without permission from the Dean of Students.

5. PUBLICITY

5.01 Publication of the policy and related procedures will be made each September 30th:

a. By the Dean of Students, through Hill Hints;

b. By a memorandum from the Director of the Student Center to department

chairs, directors, deans and vice presidents;

c. By an article printed in the University Star;

d. By a letter from the Director of the Student Center to all students organizations;

e. By a notice included in the Student Organization Handbook.

7. MAJOR RESPONSIBILITIES ASSOCIATED WITH THIS OL

7.01 Major responsibilities for routine assignments associated with this OL include the following:

Position	Section	Date
Dean of Students	Review	Dec. 1 (E4Y)

Approved: /s/ John H. Garrison
Reviewer

Approved: /s/ Leatha Milog
Vice President

Approved: /s/ Robert C. Hardesty
President

APPENDIX F

Memo To : All SWT/OL Holders

SWT/OL No. 09.06
Issue No. 1
Effective Date:
01/15/88

Subject: Posting/Distribution of Signs on Campus*

Reviewer: Dean of Students

Review Cycle: December, E4Y

INDEXING TERMS FOR THIS OL
Petitions
Posters
Signs
Solicitation

1. PURPOSE

1.01 The purpose of this operating letter is to establish a policy concerning the posting/distribution of signs, petitions, handbills, posters and literature on campus.

1.02 With the exception of posting of signs or posters, this OL does not govern political activities, which are governed by SWT/OL No. 09.03, "Political Activities on Campus."

2. POSTING/DISTRIBUTION OF PETITION, HANDBILLS, AND LITERATURE

2.01 A person or organization may distribute petitions, handbills, or literature provided the requirements of SWT/OL No. 09.05, "Solicitation on Campus," are followed.

2.02 Distribution of materials under this section is allowed only within the Campus Expression area, the LBJ Memorial Student Center, or, in

the case of special activities, at other locations solely within the discretion of the Dean of Students (or designee) The distribution of political materials is governed by SWT/OL No. 09.03, "Political Activities on Campus," and is limited only to the Campus Expression Area.

* NOTE: This OL was formerly part of SWT/OL 09.05, "Solicitation and the Distribution of Signs on Campus;" is [sic] now limited to information on SWT/OL 09.05, "Solicitation on Campus."

2.03 Signs may be posted in buildings only on bulletin boards.

2.04 If after a reasonable investigation, the Dean of Students (or designee) determines that a student or organization is posting in violation of this OL, the Dean (or designee) shall order the violation to cease, and may refer the matter to the Director of Student Justice.

3. SIGNS AND BULLETIN BOARDS

3.01 "Sign" means any decal, notice, placard, or poster; and "posting" means any method employed for displaying a sign.

3.02 A person or organization desiring to post a sign or signs on campus, must comply with the following rules:

a. The date of posting must be placed on each sign.

b. Posting will be allowed for a two-week period.

c. Signs may not exceed 22 x 28 inches in size.

d. <u>No object other than a sign may be posted on campus</u>.

e. A person or organization desiring to distribute or post materials on campus must deposit a copy of each item with the Director of the Student Center (or designee). This requirement does not mean that the Dean of Students (or designee) must approve material before it is distributed. Instead, it is intended only as a means of keeping records of activities on the University campus.

3.03 Signs may <u>not</u> be attached to or on:

a. a tree, shrub or plant;
b. a permanent sign or another sign which has been properly posted;
c. a fence or chain or its support structure;
d. a brick, concrete, or masonry structure;
e. a statue, monument, or similar structure;
f. a utility pole or traffic light control junction box;
g. a fire hydrant or any object within 25 feet of a fire hydrant;
h. a curb or sidewalk or between a curb and sidewalk;
i. a building or wall, except on a bulletin board, as provided in section 2.03 above.
j. a bench or bus stop;
k. a trash can or dumpster.

3.04 No sign may be posted if it:

a. will interfere with the free flow of vehicular or pedestrian traffic;
b. is obscene or libelous;
c. advocates the deliberate violation of a federal or state law or a published

University policy;

d. will rapidly deteriorate and litter the campus facilities.

3.05 The person or organization who posts a sign shall remove the sign no later than 14 days after posting or 24 hours after the event, whichever is earlier. The area around which the sign was posted shall be cleaned and left in a good state of repair.

3.06 No person may remove a properly posted sign without permission from the Director of the Student Center (or designee).

3.07 University custodians and staff personnel have authority to remove improperly posted signs from campus facilities. The Director of the Student Center (or designee) will convey this policy in a memorandum to administrative heads on or about September 1 of each Fall semester, and on or about February 1 of each Spring semester.

3.08 Spirit signs at athletic events must be approved in advance by the Director of Athletics (or designee).

3.09 Any posting/distribution activity planned for a residence hall must first be approved by the Director of Residence Life (or designee).

4. BOOTHS

4.01 "Booth" means a table temporarily installed for the purposes of engaging in distributing petitions, handbills, or literature; or in posting signs.

4.02 Booths may be allowed only in the Campus

Expression Area, the LBJ Memorial Student Center, or, in the case of special activities, at other locations as designated solely within the discretion of the Dean of Students or designee. Booths maintained for political activities must be located in the Campus Expression Area and must be maintained in accordance with SWT/OL No. 09.03, "Political Activities on Campus."

4.03 Solicitation activities in booths must be conducted in a manner consistent with SWT/OL No. 09.05, "Solicitation on Campus," and, in addition, must meet the following requirements:

a. Each booth must meet fire and safety standards;
b. No booth may be installed and maintained for more than five consecutive calendar days;
c. Booths must be staffed by members of the sponsoring organization or department.

5. EXCEPTION AND APPEALS

5.01 The Dean of Students has the authority to grant exceptions or variances to the provisions of the OL to meet the exigencies of unusual circumstances. No person or organization may conduct any of the activities governed by this OL at variance with the policies stated herein without permission from the Dean of Students.

6. PUBLICITY

6.01 Publication of the policy and related procedures will be made each September 30th:

a. By the Dean of Students, through Hill

Hints;

b. By a memorandum from the Director of the Student Center;

c. By an article printed in the University Star;

d. By a letter from the Director of the Student Center to all student organizations;

e. By a notice included in the Student Organization Handbook.

7. MAJOR RESPONSIBILITIES ASSOCIATED WITH THIS OL

7.01 Major responsibilities for routine assignments associated with this OL include the following:

Position	Section	Date
Director of Student Center	3.07	Sept. 1 (Fall) Feb. 1 (Spring)
Dean of Students	Review	Dec. 1 (E4Y)

Approved: /s/ John H. Garrison
Reviewer

Approved: /s/ Leatha Milog
Vice President

Approved: /s/ Robert C. Hardesty
President

APPENDIX G

Memo To : All SWT/OL Holders

SWT/OL No. 09.06
Issue No. 1
Effective Date:
5/04/89

Subject: Posting/Distribution of Signs on Campus*

Reviewer: Dean of Students

Review Cycle: December, E4Y

INDEXING TERMS FOR THIS OL

Petitions
Posters
Signs
Solicitation

1. PURPOSE

1.01 The purpose of this operating letter is to establish a policy concerning the posting/distribution of signs, petitions, handbills, posters and literature on campus.

2. POSTING/DISTRIBUTION OF PETITION, HANDBILLS, AND LITERATURE

2.01 A student or organization may distribute petitions, handbills, or literature provided the requirements of SWT/OL No. 09.05, "Solicitation on Campus," are followed.

2.02 After complying with section 2.03, a student or an organization may publicly distribute outdoors, on grounds owned or controlled by the university, petitions, handbills, or pieces of literature that are not obscene, vulgar, or libelous, or that do not contain impermissible

solicitation. Distribution must be conducted in a way that does not interfere with free and unimpeded flow of pedestrian and vehicular traffic or disturb or interfere with academic, institutional, or other approved activities.

2.03 Each petition, handbill, or piece of literature shall identify the student or organization distributing it.

* NOTE: This OL was formerly part of SWT/OL 09.05, "Solicitation and the Distribution of Signs on Campus;" is now [sic] limited to information on SWT/OL 09.05, "Solicitation on Campus."

2.04 No student or organization may distribute literature accosting individuals, or by hawking or shouting. A student or organization distributing such literature shall clean the area around which the literature was distributed.

2.05 In buildings, signs may be posted only on bulletin boards.

2.06 If after a reasonable investigation, the Dean of Students (or designee) determines that a student or organization is posting in violation of this OL, the Dean (or designee) shall order the violation to cease, and may refer the matter to the Director of Student Justice.

3. SIGNS AND BULLETIN BOARDS

3.01 "Sign" means any decal, notice, placard, or poster and "posting" means any method employed for displaying a sign.

3.02 A student or organization desiring to post a sign or signs on campus, must comply with the

following rules:

a. The date of posting and name of the posting student or student organization must be placed on each sign.
b. Posting will be allowed for a two-week period.
c. Signs may not exceed 22 x 28 inches in size.
d. No object other than a sign may be posted on campus.

3.03 Signs may <u>not</u> be attached to or on:

a. a tree, shrub or plant;
b. a permanent sign or another sign which has been properly posted;
c. a fence or chain or its support structure;
d. a brick, concrete, or masonry structure;
e. a statue, monument, or similar structure;
f. a utility pole or traffic light control junction box;
g. a fire hydrant or any object within 25 feet of a fire hydrant;
h. a curb or sidewalk or between a curb and sidewalk;
i. a building or wall, except on a bulletin board, as provided in section 2.03 above.
j. a bench or bus stop;
k. a trash can or dumpster.

3.04 No sign may be posted if it:

a. will interfere with the free flow of vehicular or pedestrian traffic;
b. is obscene or libelous;

c. advocates the deliberate violation of a federal or state law or a published university policy;

d. will rapidly deteriorate and litter the campus facilities.

3.05 The student or organization who posts a sign shall remove the sign no later than 14 days after posting or 24 hours after the event which is advertised, whichever is earlier. The area around which the sign was posted shall be cleaned and left in a good state of repair.

3.06 No person may remove a properly posted sign without permission from the Director of the Student Center (or designee).

3.07 University custodians and staff personnel have authority to remove improperly posted signs from campus facilities. The Director of the Student Center (or designee) will convey this policy in a memorandum to administrative heads on or about September 1 of each fall semester and on or about February 1 of each spring semester.

3.08 Spirit signs at athletic events must be approved in advance by the Director of Athletics (or designee).

3.09 Any posting/distribution activity planned for a residence hall must first be approved by the Director of Residence Life (or designee).

4. BOOTHS

4.01 "Booth" means a table temporarily installed for the purposes of engaging in distributing petitions, handbills, or literature; or posting signs.

4.02 Booths may be allowed only in the Campus Expression Area, the LBJ Memorial Student Center, or, in the case of special activities, at other locations as designated solely within the discretion of the Dean of Students or design.

4.03 Solicitation activities in booths must be conducted in a manner consistent with SWT/OL No. 09.05, "Solicitation on Campus," and, in addition, must meet the following requirements:

a. Each booth must meet fire and safety standards;
b. A booth may be installed and maintained in its reserved location for up to five consecutive calendar days;
c. Booths must be staffed by members of the sponsoring organization or department.

5. EXCEPTION AND APPEALS

5.01 The Dean of Students has the authority to grant exceptions or variances to the provisions of the OL to meet the exigencies of unusual circumstances. No student or organization may conduct any of the activities governed by this OL in variance to the policies stated herein without permission from the Dean of Students.

6. PUBLICITY

6.01 Publication of the policy and related procedures will be made each September 30th:

a. By the Dean of Students, through Hill Hints;
b. By a memorandum from the Director of the Student Center.

c. By an article printed in the University Star;

d. By a letter from the Director of the Student Center to all student organizations;

e. By a notice included in the Student Organization Handbook.

7. MAJOR RESPONSIBILITIES ASSOCIATED WITH THIS OL

7.01 Major responsibilities for routine assignments associated with this OL include the following:

Position	Section	Month	Day
Dean of Students	Review	December (E4Y)1	

Approved: _____
Reviewer

Approved: _____
Vice President

Approved: _____
President

APPENDIX H

MEMO TO: All SWT/OL Holders — SWT/OL No. 09.20 Issue No. 2

SUBJECT: Campus Expressions Area — Effective Date:

REVIEWER: Dean of Students

REVIEW CYCLE: January (ONY)

INDEXING TERMS FOR THIS OL

Politics Speakers Speeches

---

1. PURPOSE

1.01 The purpose of this OL is to establish a Campus Expression Area, define its location, and prescribe regulations for its use.

1.02 Use of the Campus Expression Area may require reference to and compliance with one or more of the following SWT/OL's:

a. SWT/OL. 09.03, "Political Activities on Campus;

b. SWT/OL No. 09.21, "Speeches, Lectures and Addresses by Off-Campus Speakers;" or

c. SWT/OL No. 09.05, "Solicitation and the Distribution of Signs on Campus."

2. DEFINITIONS OF CAMPUS EXPRESSION AREA

2.01 The Campus Expression Area is defined as that location where, within the regulations specified below, all persons may express themselves on any topic and enjoy their rights

of free speech and assembly guaranteed under the First and Fourteenth Amendments of the Constitution of the United States, as implemented by statutory law and defined by judicial interpretation.

2.02 The Campus Expression Area is the area from the first row of sidewalk steps east of LBJ Drive to the statue of the horses in front of Leland Derrick Hall, bounded on the north by the Psychology Building and the Taylor Murphy History Building, and on the south by Flowers Hall and the Liberal Arts Building. This area is graphically indicated on the attached drawing.

3. USE OF THE CAMPUS EXPRESSION AREA

3.01 Students and members of the public may use the Campus Expression Area for any lawful purpose consistent with university rules and policy. The Dean of Students will not deny a request for its use unless after reasoned inquiry, it appears that the user will advocate actions constituting a clear and present danger to the university's orderly operation, or unless such use conflicts with another scheduled use of the Campus Expression Area.

3.02 "Advocate," as described in section 4.01 [sic] above, means preparing the group addressed for imminent action and steering it to such action, as opposed to the abstract espousal of the moral propriety of a course of action by resort to force. There must be not only advocacy to action but also a reasonable apprehension of imminent danger to the essential functions and purposes of the university.

3.03 A speaker's advocacy of the following action constitutes a clear and present danger to the university's orderly operations, and is

prohibited:

a. The violent overthrow of the government of the United States, the State of Texas, or any political subdivision thereof; or
b. The willful damage or destruction, or seizure and subversion, of the university's buildings or other property; or
c. The forcible disruption or impairment of or interference with the university's regularly scheduled classes or other educational function; or
d. The physical harm, coercion, intimidation, or other invasion of lawful rights of the university's officials, faculty members, or students; or
e. Other campus disorder of a violent nature.

3.04 The Campus Expression Area may be used for approved purposes from 12:00 noon to 1:00 p.m. and 3:00 p.m. to 7:00 p.m. each day. Request for reservations to use the Campus Expression Area must be filed in the office of the Dean of Students at lease 48 hours in advance of the intended activity.

3.05 A reservation to use the Campus Expression Area may be made for no longer than five consecutive days per reservation.

3.06 The Campus Expression Area must be used in accordance with the following rules:

a. There must be no interference with the free flow of pedestrians or vehicular traffic;
b. There must be no interruption or disruption of classes or previously scheduled university activities;

c. Harassing or intimidating techniques or behavior may not be used;

d. Obscene or libelous materials or statement [sic] may not be used;

e. The area must be left clean and in a good state of repair.

3.07 Approval for the use of the Campus Expression Area or any part of that area after 7:00 p.m. for the social functions of student organizations will be at the discretion of the Director of Student Development.

* 3.08 Violations of the policies set forth in this O.L. will be referred to the Director of Student Justice for review and may result in sanctions against students and/or student organizations involved.

4. MAJOR RESPONSIBILITIES ASSOCIATED WITH THIS OL

4.01 Major responsibilities for routine assignments associated with this OL include the following:

Position	Section	Month	Day
Dean of Students	Review	January	(ONY)1

Approved: _____
Dean of Students

Approved: _____
Vice President for Student and Institutional Relations

Approved: _____
President

APPENDIX I

Memo to: All SWT/OL Holders

SWT/OL No. 09.20
Issue No. 2
Effective Date:

Subj: Use of the Campus Expression Area and the Symbolic Structure Area

Reviewer: Dean of Students

Review Cycle: January, Odd-Numbered Years

INDEXING TERMS FOR THIS OL

Symbolic Structure Area
Campus Expression Area
Student Organizations
Speakers Speeches

---

1. PURPOSE

1.01 We intend for this OL to establish places on campus where persons may demonstrate and express ideas in a manner that will protect the university's interests and the rights of others. In establishing the campus expression area and the symbolic structure area, we do not prohibit persons from demonstrating or expressing ideas at other places or times on campus, provided they respect the university's interests and the rights of others.

2. DEFINITIONS

2.01 "Campus expression area" means the area from the first row of sidewalk steps east of LBJ Drive to the Fighting Stallions statue in front of Leland Derrick Hall, bounded on the north by the Psychology Building and the

Taylor-Murphy History Building, and on the south by Flowers Hall and Evans Liberal Arts Building.

2.02 "Dean" means the Dean of Students.

2.03 "Significant university interests" include, but are not limited to, the following:

a. Preserving an academic atmosphere.

1. Classes should not be disrupted.
2. Quiet is necessary in areas used for study.
3. Social, recreational, and developmental programs and other university activities should not be disrupted.

b. Maintaining security and safety for persons and property on campus.

c. Protecting the privacy of students, faculty, and staff.

d. Controlling pedestrians and vehicular traffic.

e. Protecting persons on campus from crime and preventing unlawful activities on campus.

f. Preserving the beauty of the university's campus, buildings, and facilities.

g. Maintaining the campus, buildings, and facilities in a clean, orderly, and appealing appearance, and avoiding unnecessary wear and tear on buildings, grounds, and facilities.

h. Preserving the architectural lines of important and historic university buildings.

i. Protecting students, faculty, and staff from deception, fraud, and commercial exploitation.

j. Eliminating unnecessary costs and waste of university resources.

2.04 "Symbolic structure" means a physical object that is intended to convey a particular message. There must be a substantial likelihood that the message will be understood by those who view it. Symbolic structures may be props and displays, such as coffins, crates, crosses, cages, and statues; furniture and furnishings such as desks, tables, bookcases, and cabinets; shelters, such as tents, boxes, shanties, and other enclosures; and other similar objects.

2.05 "Symbolic structure area" means the raised area on the south mall just west of the bookstore and adjacent to Evans Liberal Arts Building. This area is set aside for structures that will remain in place for a least three days.

3. USE OF THE CAMPUS EXPRESSION AREA

3.01 Students and chartered or registered student organizations may reserve the campus expression area for speeches, demonstrations and similar forms of expression between the hours of 8:00 a.m. to 12:00 midnight each day. A student or chartered or registered student organization must reserve the area through the Dean's office in advance of the intended activity (Attachment 1). The Dean will not deny a request unless the proposed use conflicts with another scheduled activity at the campus expression area, or unless the intended use would infringe upon a significant university interest.

3.02 Students or student organizations may reserve the campus expression area for up to five consecutive days. The Dean, at his discretion, may renew reservation requests.

4. USE OF THE SYMBOLIC STRUCTURE AREA

4.01 Students and chartered and registered student organizations that desire to use a structure as symbolic speech or conduct should prepare a written proposal and present it to the university safety officer, who will determine whether the proposed structure will pose an unreasonable threat to the safety or persons or property on campus. Upon receiving notification from the safety officer that the structure will not pose an unreasonable threat to the safety of persons of property on campus, the student or organization should schedule the activity in advance with the Dean. The Dean will not deny a request unless the proposed use conflicts with another scheduled activity at the symbolic structure area, or unless the intended use would infringe upon a significant university interest.

4.02 Students or student organizations may reserve the symbolic structure area for up to two weeks. The Dean, at his discretion, may renew reservation requests.

4.03 Judging each request on a case-by-case basis, the Dean may impose reasonable time, place, and manner restrictions on the requested use, in order to serve a significant university interest. The Dean will advise the requestor of such restrictions, and of any changes in the restrictions. These restrictions include, but are not limited to, requiring that the structure be removed for a period of time, changing the

location of the structure, and requiring the requestor to purchase liability insurance naming the university as an additional insured.

5. MAJOR RESPONSIBILITIES ASSOCIATED WITH THIS OL

5.01 Major responsibilities for routine assignments associated with this OL include the following:

Position	Section	Month	Day
Dean of Students	Review	January	1 (ONY)

Approved: _____
Dean of Students

Approved: _____
Vice President

Approved: _____
President

Attachment 1

SWTSU CAMPUS EXPRESSION AREA
RESERVATION FORM

_____ Date _____
Name of Person or Organization

_____ Telephone _____
Address

_____
Name, Address, Telephone Number of Person Making Request

Type of Activity: _____

_____

_____

Date(s) of Activity: _____

_____
Signature of Person or
Organization Representative

Reservation approved/disapproved.

_____ _____
Date Dean of Students/Designee

Special Conditions: _____

_____

_____

SWT/OL Form No. 09.20-SL-1089-01

Supreme Court, U.S.
FILED
DEC 22 1992
OFFICE OF THE CLERK

(2)

No. 92-1008

In The

Supreme Court of the United States

October Term, 1992

JEROME K. SUPPLE, DANIEL S. OUELLETTE, DANIEL N. MATHESON, III, THOMAS R. KOWALSKI, JANE C. MONDAY, WILLIAM L. CUNNINGHAM, W.C. PERRY, NORMAN D. ELDER, CLYDE C. WADDELL, JR. BECKY R. ESPINO, TOM BURDENSKI,

Petitioners,

v.

HAYS COUNTY GUARDIAN, JEFFREY STEFANOFF, VICKI HARTIN, WEBB BRANEN, JOE GADDY, JODY DODD, JOE PTAK, ROBERT MARTINEZ, and JOHN DEMAREE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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32 pp

QUESTIONS PRESENTED

Respondents do not believe that this case presents either of the Questions set forth in Petitioners Application for Writ of Certiorari and that those questions can not be decided on this record.

Respondents restate the questions presented as follows:

1. The Question Of Non-Discriminatory Restrictions On Commercial Advertising Is Not Presented By The Opinion Below Or By The Record.

2. The Decision By The Court Of Appeals That The Outdoor Grounds Of A University Constitute A Designated Public Forum Does Not Conflict With An Opinion From This Court Or From Any Other Circuit.

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No. 92-1008

In The

Supreme Court of the United States

October Term, 1992

JEROME K. SUPPLE, DANIEL S. OUELLETTE, DANIEL N. MATHESON, III, THOMAS R. KOWALSKI, JANE C. MONDAY, WILLIAM L. CUNNINGHAM, W.C. PERRY, NORMAN D. ELDER, CLYDE C. WADDELL, JR. BECKY R. ESPINO, TOM BURDENSKI,

Petitioners,

v.

HAYS COUNTY GUARDIAN, JEFFREY STEFANOFF, VICKI HARTIN, WEBB BRANEN, JOE GADDY, JODY DODD, JOE PTAK, ROBERT MARTINEZ, and JOHN DEMAREE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, The Hays County Guardian, et al., ("Guardian") respectfully request that this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's opinion in this case. That opinion was decided on August 10, 1992 and is reported at 969 F.2d 111 (5th Cir. 1992).

I.

STATEMENT OF FACTS

The Respondents adopt the Petitioners Statement of Facts with the following revisions and corrections:

SWTSU is not, even under its own policies, an enclave without commercial activity. While SWTSU actively encourages and promotes the sale and the offer for sale of a wide range of goods, OL 09.05, appx. at 53-57,[1] it seeks to burden newspapers (other than its own) with substantially more onerous rules than those enforced against other commercial products. OL 09.05 § 2.05(a), appx. at p. 54.

Southwest Texas State University ("SWTSU") is the seventh largest public institution of higher learning in the State of Texas. Merchandise, such as candy, soft drinks and the like are widely available for sale on campus. Rec., Tr. Vol. I, p. 141/ln. 7-16. "Yellow page" advertising and the like are found throughout the campus. Rec., Tr. Vol. I, p. 142/ln. 23 -p. 143/ln. 19.

The University publishes its own student newspaper, the *University Star* (*"Star"*). SWTSU imposes no restrictions on the *Star,* either as to advertising or as to where it may be distributed on campus. *Hays County Guardian v. Supple,* 969 F.2d 111, 120 (5th Cir. 1999) (*"Guardian* II") appx. at 13. The *Star* carries advertisements which are identical to those carried in the *Guardian. Hays County Guardian v. Supple,* C.A. No. A-90-CA-203 (W.D. Tex. 1991)

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[1] Appendix citations are to the appendices contained in the Petition for Writ of Certiorari.

(*Guardian* I), appx. at p. 33 (FOF 30: "The *Star* competes for and publishes commercial advertising identical to the advertising found within the *Guardian*.") The *University Star* "contains a greater number and density of advertisements than the *Guardian*." *Guardian II*, 969 F.2d at 120, appx. at 13.

Prior to August 31, 1989 the *Guardian* was allowed free access to the University. On that date a small group of university officials met without notice to the *Guardian* and determined to "reinterpret" the University's regulations against soliciting. For the first time the University began enforcing its ban on soliciting (that is, any sale or offer for sale of merchandise, OL 9.05, appx. at 53) in such a manner as to include free newspapers such as the *Guardian*.

II.

REASONS FOR DENYING CERTIORARI

1. The Question Of Non-Discriminatory Restrictions On Commercial Advertising Is Not Presented By The Opinion Below Or By The Record.

A. Advisory Opinion

In their First Question, Petitioners call upon this Court to delineate the "ability of a state university to restrict the distribution of commercial advertising on campus" [Petition, First Question Presented]. In order to claim this question Petitioners presume four issues. First, they presume that Southwest Texas State University has an inflexible rule that no commercial activity is allowed

on its' campus. Second, they argue that no newspaper is allowed to distribute in the campus market if it contains advertising. Third, they presume that the Court of Appeals has forbidden lawful control of commercial speech. Fourth, they claim that the newspaper in question, the *Guardian,* is one with no purpose other than to propose commercial transactions. As Respondents show below the record does not support any of these assumptions.

Since these premises do not, in fact, present themselves on this record the Court is not in a position to issue "guidance" [Petition at p.7] to the defendants' on how best to preclude the dissemination of ideas on the SWTSU campus. Put another way, the Petitioners simply request an improper advisory opinion, *Montana v. Imlay,* ___ U.S. ___ 113 S.Ct. 444, 445 (1992) (Justice Stevens, concurring); *Flast v. Cohen,* 392 U.S. 83 (1950), on how best to skirt the First Amendment's prohibition on governmental intrusion into the commerce of information which the Founders sought to protect.

B. First Presumption: No Commercial Activity.

Both the Court of Appeals and the District Court found that commercial activity is ubiquitous on the SWTSU campus. The *University Star* carries advertising that is identical to that carried by the *Guardian. Guardian II,* 969 F.2d at 120, appx. at 8. Given the broad availability of advertising at SWTSU, the Petitioners' free speech

discrimination must be rejected. See, *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 473 (1988)("Our advertising cases have never distinguished among various modes of written advertisements to the general public.")[2]

In this case newspapers competing with the University's newspaper are singled out and confined to remote locations on this large urban campus because they contain print advertisements about products, many of which are directly available for sale on campus. These are often the same advertisements contained in the University's "student" newspaper. (Rec., Tr. Vol. I, p. 141/ln. 716). As this Court said in *Martin v. City of Struthers*, 319 U.S. 141, (1943):

> Freedom to distribute information to every citizen whenever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the

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[2] And as *Shapiro* notes, *Bates v. State Bar of Arizona*, 433 U.S. 350, 372, n.26 (1977) equates advertising in telephone directories with newspaper advertising. *Shapiro*, 486 U.S. at 473. Yellow page advertising is not banned from the SWTSU campuses. (Rec., Tr. Vol. 1, pp. 142/ln. 23-143/ln. 19.)

> Constitution, the naked restriction on the dissemination of ideas.

Martin, 319 at 146-47.

Here, the university seeks to forbid distribution of newspapers (other than its own) while at the same time allowing the underlying commercial transactions that its rules refuse to allow advertising for. It singles out the independent press for treatment not generally applicable to other enterprises on campus. *Compare* OL 09.05 §2.02(a) (distribution of newspapers) *with* §2.02(b) (sale of food items), §2.02(c) (distribution of the *University Star* and other publications) and §2.02(m) (advertisements in University publications), appx. at 54-56. It is true that the First Amendment does not prohibit all regulations of the press; however, the Free Press Clause does forbid singling out the press for treatment that is discriminatory. *Minn. Star & Tribune v. Minn. Com'r of Rev.*, 460 U.S. 575, 581 (1983) ("[D]ifferential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional.")

C. Second Presumption: No Distribution On Campus.

The University argues that adult students must be protected from themselves.[3] SWTSU claims (without support in the record) that university students are: "[M]ore

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[3] Since the age of majority in Texas is eighteen, the overwhelming number of these students are adults.

affluent than the population generally, more inclined to 'discretionary spending'," and that they are "concentrated together in a small area, [and thus they] constitute a tempting market for sellers". Petition at 8.

Only by denigrating the hard work, long hours and personal sacrifice of the vast majority of students who struggle to obtain their degree could the Court adopt defendants' reasoning. But what weight would this argument carry? Only a *sub-silentio* challenge to the free market system, the same market system that the *University Star* relies upon for its continued existence. The transparency of the University's argument is especially evident when the Court recalls that the University newspaper runs identical advertisements to the ones which SWTSU claims are harmful in competing newspapers.

We know that the free market of ideas is the quintessential market in American society.[4] That is, the rights of free speech and press are upheld to promote and preserve a "free trade of ideas." *Abrams v. United States*, 250 U.S. 616, 630 (1919). Freedom of speech "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

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[4] Even in the elementary/high school setting, much less with regard to adult college students, a school board "may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons." *Board of Educ., Island Trees Union Free School, District No. 26 v. Pico*, 457 U.S. 853, 879 (1982) (Blackman, concurring).

It is this market that SWTSU seeks to minimize. The First Amendment and this Court's jurisprudence will not allow such a result, especially not on the campus of an institution of higher learning. *Papish v. Board of Curators*, 410 U.S. 677, 670 (1973). "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press . . . ". *Thomas v. Collins*, 323 U.S. 515, 545 (1945) (Jackson, J., concurring). Are we to presume (without record evidence) that college students need protection above and beyond that of the general population from print advertisements? And if we are, how do we reconcile the *University Star's* far more extensive distribution of identical ads. *Guardian II*, 969 F.2d at 120, appx. at 13.

The University's underinclusive regulation is broadly unconstitutional and the Court of Appeals so found.

> The University places no restrictions on the *University Star*, a paper that contains a greater number and density of advertisements than the *Guardian*. Twelve thousand copies of each issue of the *Star* were distributed on the campus. This underinclusiveness cuts against the assertion that restricting commercialism on campus was an interest of paramount importance to the University or at least an interest that required a flat prohibition on an entire medium of distribution.

Guardian II, 969 F.2d at 120, appx. at 13. See also *Carey v. Brown*, 447 U.S. 455 (1980)(ordinance against residential picketing found to be under-inclusive because it exempted labor picketing); and, *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace

of ideas in which truth will ultimately prevail, rather than to countenance monopolism of that market, whether by the Government itself or a private licensee.")

D. Third Presumption: Lawful Control Of Advertising Precluded.

When government seeks to restrain a channel of speech, it must be shown that the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763 (1988), *citing, Grayned v. Rockford*, 408 U.S. 104, 116 (1972). See also, *Fane v. Edenfield*, 945 F.2d 1514, 1517 (11th Cir. 1991), cert. granted ___ U.S. ___, 112 S.Ct. 2272 (1992). No such showing is present on this record. Given the *University Star's* distribution of identical ads no such showing could have been made. *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93-94 (1977).

Plaintiffs concede that an appropriate governmental agency may legitimately prevent illegal activity even on the part of a newspaper. *Pittsburgh Press Co. v. Pittsburgh Com'n on Human Relations*, 413 U.S. 376 (1973); *Law Students Civ. Rts. Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971). Where the newspaper is not involved in the illegal activity the issue is more complex. The inclusion of information in a newspaper is the last place that government should look to prevent the dissemination of inappropriate information. That is, the general approach must be that the advertiser itself should be the party under scrutiny. Cf. *Bigelow v. Virginia*, 421 U.S. 809 (1975). Only where the newspaper can be charged with conspiring to

engage in unlawful activity, *Pittsburgh Press*, 413 U.S. at 387, may government attack the messenger rather than the message itself.

If the University – or any other state entity – believes that a particular advertisement is false or misleading, it may preclude that ad's distribution and thereby test the reasonableness of such a ban. Cf. *Head v. New Mexico Board*, 374 U.S. 242 (1963). It may even have the authority to ban literature which contains such ads. *Posadas De Puerto Rico Ass'n v. Tourism Co.*, 478 U.S. 328 (1986). But it may not issue a blanket prohibition against the dissemination of nongovernmental news sources simply because one of these entities might someday contain such an ad. In the analogous circumstance of the electronic press, Chief Justice Burger has held that, because a broadcast entity has First Amendment protection, the government has little power to interfere with the editorial decision to accept or reject advertisements. *C.B.S., Inc. v. Democratic Nat. Com.*, 412 U.S. 94, 120-21 (1973).

E. Fourth Presumption: Newspaper Is Commercial Speech.

The Press Clause of the First Amendment provides protection separate and apart from the Speech Clause of the First Amendment. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy." *New York Times Co. v. U.S.*, 403 U.S. 713, 717 (1971) (Justice Black, concurring).

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) (footnote omitted). In Justice Stewart's words "[t]he primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches." P. Stewart, *"On Freedom of the Press,"* 26 Hastings L. J. 631, 634 (1975). "Thus the press serves and was designed to serve as a powerful antidote to any abuse of power by governmental officials and as a constitutionally chosen means for helping officials elected by the people be responsible to all the people whom they were selected to serve." *Mills v. Alabama,* 384 U.S. 214, 219 (1966).

This right extends to the editorial function of advertising.

> The power of a privately owned newspaper to advance its own political, social and economic views is bounded by only two factors: First, the acceptance of a sufficient number of readers – and hence advertisers – to assure financial success; and, second, the journalistic integrity of its editors and publishers.

C.B.S., Inc., 412 U.S. at 117 cited with approval in *Miami Herald*, 418 U.S. at 255. "The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978) (footnote omitted). See also *Red Lion*, 395 U.S. at 390.

The university may not merely label the *Guardian* commercial and thus ban it. State labels are not dispositive of the degree of speech protection. *Bigelow*, 421 U.S. at 826. But, even though it contains commercial advertisements with lower protected status on the First Amendment ladder, *Board of Trustees of State Univ. of N.Y. v. Fox*, ___ U.S. ___, 109 S.Ct. 3028, 3033 (1989), that does not make the commercial speech the lowest-common-denominator in the speech equation. Where traditional and commercial speech are intertwined the Court must determine whether the fully protected speech is the significant communication or whether it is simply an after thought tacked on to a sales pitch. *Fox*, 109 S.Ct. at 3031.

In the instant cause, the record is undisputed that speech of the highest order is at stake. *Miami Herald*, 418 U.S. at 258; *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 467, n.4 (6th Cir. 1991), cert. granted *sub nom. Cincinnati, Ohio v. Discovery Network, Inc.*, ___ U.S. ___, 112 S.Ct. 1290 (1992). While the *Guardian* does contain advertisements, nevertheless these advertisements are not the purpose of the paper. *See, Valentine v. Chrestensen*, 316 U.S. 52 (1942) as analyzed in *Pittsburgh Press*, 413 U.S. at 385. The purpose of the newspaper is to

report on issues concerning peace, justice and the environment. *Guardian II*, 969 F.2d at 120, appx. at 14. Such traditional First Amendment speech (or speech significantly intertwined with traditional speech) is fully protected. *Riley v. Nat'l Federation of the Blind of N.C.*, 487 U.S. 781 (1988).

The press, of course, cannot long publish without financial support. Income is generally obtained by, among other things, seeking and accepting commercial advertising. Given these parameters it is clear that, at least where the press is considered[5], the "speech" of the publisher so outweighs the commercial aspects of the advertisements that the amalgamation must be evaluated on a "pure" speech basis. *Riley*, 487 U.S. at 796. ("[W]e do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech.") *See also, Meyer v. Grant*, 486 U.S. 414, 442, n. 5 (1988); and *Discovery Network*, 946 F.2d at 467, n.4

The Petitioners reject this analysis based upon a tortured reading of *Fox*. That case is not dispositive of the cause *sub judice*. First, freedom of the press is specifically addressed in the Constitution, Tupperware – brand plastic storage container parties (the event addressed in *Fox*) are not. Why did the framers of the First Amendment add press rights after speech rights? Is the Press Clause a redundancy? Obviously not. Second, as demonstrated above, freedom of the press requires more than that

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[5] And where no "illegal" conduct is undertaken. *Pittsburgh Press*, 413 U.S. at 385.

newspapers be allowed editorial independence. They must have financial independence. They cannot achieve this independence without resort to advertising. Put another way: "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. City of Griffin, Ga.* 303 U.S. 444, 452 (1938).

II.

2. The Decision By The Court Of Appeals That The Outdoor Grounds Of A University Constitute A Designated Public Forum Does Not Conflict With An Opinion From This Court Or From Any Other Circuit.

A. Designated Public Forum

The Board of Regents of the Texas State University System have promulgated the following rule:

> *Speech on University Grounds.* Any group or person, whether or not a student or employee, and whether or not invited by a registered student, faculty, or staff organization, may assemble and engage in free speech activities on the grounds of the campus.

Guardian II, 969 F.2d at 117, appx. at 7. The "University's operating letter 9.06, § 2.02 allows any "student . . . [to] publicly distribute *outdoors, on grounds owned or controlled by the University,* petitions, handbills, or pieces of literature that are not obscene, vulgar, or libelous, or that do not contain impermissible solicitation." *Id.* at 7-8 (emphasis in original). And, of course, the *University Star* is granted unlimited distribution. *Id.* at 8. No clearer description of a designated public forum could be possible.

The Court of Appeals found, based on this evidence, that "the University deliberately fosters an environment in which students may freely distribute newspapers, pamphlets, and other literatures concerning public affairs outdoors, on grounds owned or controlled by the University," subject only to the limits necessary to preserve the academic mission and maintain order. *Id.*

This finding is both logically and intuitively correct. That is: (1) the University has chosen to open itself as a forum; (2) the University places no restrictions on the *University Star* newspaper which contains similar ads to those found in the *Guardian;* and (3) the University allows widespread sale and offer for sale of merchandise on campus (restricting only newspapers other than the *University Star* to five remote locations).[6]

Alternatively, the university, or at least significant portions of it, is designated by the Texas Constitution as public. *See, Jones v. Memorial Hospital System,* 746 S.W.2d 891 (Tex. App. – Houston [1st Dist.] 1988, no writ) and *Right to Life Advocates, Inc. v. Aaron Women's Clinic,* 737

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[6] The University allows widespread advertising in the *University Star;* it provides ample space in virtually every building for sale of candy, soft drinks, etc. by vending machines; it allows unregulated solicitation throughout campus by "yellow page" advertising, and it does not seek to censor television, radio, telephone and/or fax advertising. Thus, the result of the Petitioners rule is singular: It precludes small, underfunded publications such as the *Guardian* from reaching their intended audience with no incremental benefit in "protecting" the adult faculty and students of the University from being exposed to (protected) commercial information. At the very least this renders the regulation underinclusive.

S.W.2d 564 (Tex. App. – Houston [14th Dist.] 1987, writ denied), *cert. denied*, ___ U.S. ___, 109 S.Ct. 71 (1988). *Jones* and *Right to Life Advocates* establish that, under Texas law, even a private corporation significantly "involved in state and federal activity" is treated as "a public entity for purposes of upholding the state constitutional right of free speech." *Jones*, 746 S.W.2d at 896. *Right to Life Advocates* adopts and follows *New Jersey v. Schmid*, 423 A.2d 615 (N.J. S.Ct. 1980) *appeal dismissed sub. nom., Princeton University v. Schmid*, 455 U.S. 100 (1981). *Schmid* in turn applies state open forum analysis to a private university campus and requires that freedom of speech be allowed unhindered. *See*, P. Linzer, *Why Bother With State Bills of Rights*, 68 Tex. L. Rev. 1573, 1599 (1990).

If the Texas Constitution makes SWTSU an open forum it cannot be doubted that it is a public forum by designation. *Community for Creative Non-violence v. Turner*, 893 F.2d 1387, 1391 (D.C. Cir. 1990). No higher authority in Texas law exists to establish such a designation. It is beyond debate that this Texas case law applies to the distribution of newspapers. *Houston Chronicle Pub. Co. v. City of Houston*, 620 S.W.2d 833, 837 (Tex.Civ.App. – Houston [14th Dist.] 1981, no writ); *Ex Parte Neil*, 222 S.W.923, 924 (Tex. 1893).

This being so, SWTSU cannot limit free access in the designated public forum portions of the university. "Regulation of such property is subject to the same limitations as that governing a traditional public forum." *Intern. Soc. For Krishna Consciousness v. Lee*, ___ U.S. ___, 112 S.Ct. 2701, 2705 (1992).

> The [United States] Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as applied in a traditional public forum.

Perry Education Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45-6 (1983). Once a forum is generally open, government can not pick and choose the type of expressive activity allowed simply by whim.[7] *Searcey v. Harris*, 888 F.2d 1314, 1324 (11th Cir. 1989).

"While it is proper to weigh the need to maintain the dignity and purpose of a public building, or to impose special security requirements, other factors may point to the conclusion that the Government must permit wider access to the forum than it has otherwise intended." *U.S. v. Kokinda*, ___ U.S. ___, 110 S.Ct. 3115, 3125 (1990) (Kennedy, concurring) (citations omitted). *See also Guardian II*, 969 F.2d at 117, appx. at p. 5. Having opened the campus for expressive activity by students and non-students alike, the university cannot withdraw a portion of these rights – that is the right to pass out newspapers – except by establishing that its actions are reasonable time, place and manner restrictions. *U.S. v. Grace*, 461 U.S. 171 (1983);

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[7] Even in a non-forum the government must demonstrate that its actions are reasonable. *Board of Airport Comm'rs v. Jews For Jesus*, 482 U.S. 569 (1987). This is so even for leafletting. *Lee*, 112 S.Ct. at 2713 (O'Connor, J. concurring). Regulation of newspapers in non-public forums must be particularly reasonable. *Sentinel Communication Co. v. Watts*, 936 F.2d 1189, 1205-07 (11th Cir. 1991).

Acorn v. St. Louis County, 930 F.2d 591, 594 (8th Cir. 1991). Thus, Petitioners claim that the ruling below "sharply curtails the university's ability to restrict other *protected expressive activity* . . . in outdoor locations," Petition at p. 13 (emphasis supplied), is both clearly correct and totally beside the point.

First, the Petitioners are correct that the First Amendment is specifically designed to limit government's powers to restrain what Petitioners admit is, "protected expressive activity". The Amendment accomplishes its very purpose if it does, in fact, provide free access to information on the SWTSU campus. But it is to this conclusion that the Petitioners lodge their real objection. That is, this university takes exception to the very genius of the Bill of Rights.

SWTSU must acknowledge that the expressive activity it seeks to limit (i.e., advertising) is widely disseminated throughout the campus by the university using the university sponsored and controlled newspaper as its vehicle and revenue collector. If government can, within the limits of the First Amendment, distribute (and monopolize) such income-generating ads while at the same time denying other newspapers their very existence then the independence of the Fourth Estate must be written off. But such is not the jurisprudence of the First Amendment. Cf. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981).

The degree of First Amendment protection is not diminished even where newspapers are sold rather than given away. *Heffron v. Internat'l Soc. for Krishna Consciousness*, 452 U.S. 640, 647 (1981); *Schaumburg v. Citizens for a*

Better Environment, 444 U.S. 620, 632 (1980); *Pittsburgh Press*, 413 U.S. at 385; *Murdock v. Penn.*, 319 U.S. 105, 111 (1943). How then can the *Guardian's* First Amendment rights be diminished when it simply includes truthful ads which are already made available on campus by the university itself.

Second, the University's claim is beside the point because the Fifth Circuit did not preclude it from restricting improper or inappropriate activity even if it would otherwise be sanctioned by the First Amendment. As the Court below carefully stated, the designated forum in question remains "subject to the limits necessary to preserve the academic mission [of the University] and to [its'] need to maintain order." *Guardian II*, 969 F.2d at 117, appx. at 8. See also, *Metromedia, Inc.*, 453 U.S. at 516.

B. No Conflict With This Court's Precedents

Petitioners claim a conflict between the reasoned decision below and this Court's precedents. Yet no such conflict appears in Petitioners' Brief. *Widmar v. Vincent*, 454 U.S. 263 (1981), is cited as conflicting with the panel decision below. But that case affirmatively states:

> This Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum. "The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas'." Moreover, the capacity of a group or individual "to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communicating with the

> administration, faculty members, and other students." We therefore have held that students enjoy First Amendment rights of speech and association on campus, and that the "denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes" must be subjected to the level of scrutiny appropriate to any form of prior restraint.

Widmar, 454 U.S. 263 at n. 5 (citations omitted). See also, *Healy v. James*, 408 U.S. 169 (1972) and *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) (the right to free speech "is 'no where more vital' than in our schools and universities.")

C. No Inter-Circuit Conflict.

The Petitioners cite *Planned Parenthood v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991) as compelling "a different result if applied to this case." Petitioner's Brief at p. 15. Even a cursory review of *Planned Parenthood* demonstrates that it is not in conflict with the result challenged here. Rather, *Planned Parenthood* fully supports the ruling below.

To be sure, *Planned Parenthood* is driven by different facts. It involves curtailing high school (juvenile) student rights.[8] The *Guardian* is directed to adults. *Planned Parenthood* involves an advertiser's demand for access to a

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[8] The Court has recently articulated the difference between the First Amendment's effect on adults and it's effect on minors. See, *Sable Communications of Calif., Inc. v. F.C.C.*, ___ U.S. ___ 109 S.Ct. 2829, 2836 (1989). Put in *Planned Parenthood* terms: "In light of the nature of the [high school] environment, educators must have the ability to consider the 'emotional maturity of the

school-sponsored publication. *Planned Parenthood,* 941 F.2d at 822. The *Guardian* is an entity totally independent of SWTSU.[9] The high school in question treated all publications alike. *Id.* at 823. SWTSU allows the *University Star* to carry ads which are identical to those in the *Guardian*. Nonetheless, the *Star* distributes without University interference while the *Guardian* is threatened by legal action.

Based on these critical distinctions alone, it is clear that *Planned Parenthood* does not represent a conflict with the opinion below. Nevertheless it is also important to point out why *Planned Parenthood* affirmatively supports (rather than opposes) the result in *Guardian II.*

Planned Parenthood found as an evidentiary matter that there was no evidence "to demonstrate the 'clear intent to create a public forum' [as] was present in other public forum cases". *Planned Parenthood,* 941 F.2d at 823. In a footnote, the court carefully analyzed this Court's precedent upholding designated open forums (*Id.* at n. 9)

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intended audience' as well as the authority to refuse to 'associate the school with any position other than neutrality on matters of political controversy'." *Planned Parenthood,* 941 F.2d at 829.

[9] *Planned Parenthood* sought to force its ad into a school sponsored newspaper which was part of the schools' education mission. "When 'school-sponsored' speech can fairly be characterized as part of the schools' mission . . . the first amendment affords educators 'greater control' in deciding when the school will affirmatively 'promote' or 'lend its name and resources' to particular speech. *Planned Parenthood,* 941 F.2d at 828 (citations omitted). The *Guardian,* of course, bears no imprimatur of SWTSU. If there were confusion about the *Guardian's* distinction from the university, the newspaper (possibly more than the SWTSU) would wish to make its independence clear.

and noted that its result would be different were such evidence found in the record. *Id.* at 825 ("We agree that a high school may create a public forum or designate a forum for limited purposes".)

Second, *Planned Parenthood* requires analysis of the most important factor in the public forum debate. "When identifying the relevant forum, we focus 'on the access sought by the speaker'." *Planned Parenthood,* 941 F.2d at 822, n. 5 (citations omitted). In *Planned Parenthood* access was sought to the high school newspaper. In the cause *sub judice* the forum is the outdoor areas of a large urban campus.

In the final analysis "each public forum case is unique on its facts". *Id.* at 822. *Planned Parenthood* is distinct factually and intellectually from the issues under consideration here. Thus, it cannot constitute a conflict with the holding below.

D. Traditional Open Forum

Because it found that the University has designated the grounds of its campus as an open forum the Court below did not reach the issue of whether the SWTSU campus is a traditional open forum. However, in *Glover v. Cole,* 762 F.2d 1197 (4th Cir. 1985) the Fourth Circuit reached and resolved this very question, finding that a university campus is open for expressive conduct by all members of the public. See also *Jones v. Board of Regents of the University of Arizona,* 436 F.2d 618 (9th Cir. 1970). As this Court recognized in *Rust v. Sullivan,* ___ U.S. ___, 111 S.Ct. 1759, 1776 (1991), a "university is a traditional

sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere . . . is restricted by the vagueness and overbreadth doctrines of the First Amendment." Thus, if a question had existed as to the designation of the outdoor grounds at SWTSU as an open forum, the Court of Appeals would necessarily have had to conclude that the campus was a traditional open forum.

III.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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